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## CRISIS BUREAUCRACY: HOMELAND SECURITY AND THE POLITICAL DESIGN OF LEGAL MANDATES

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*Policymakers fight over bureaucratic structure because it helps shape the legal interpretations and regulatory decisions of agencies through which modern governments operate. In this article, we update positive political theories of bureaucratic structure to encompass two new issues with important implications for lawyers and political scientists: the implications of legislative responses to a crisis, and the uncertainty surrounding major bureaucratic reorganizations. The resulting perspective affords a better understanding of how agencies interpret their legal mandates and deploy their administrative discretion.*

*We apply the theory to the creation of the Department of Homeland Security. Two principal questions surrounding this creation are (1) why the president changed from opposing the development of a new department to supporting it and (2) why his plan for such a department was far beyond the scope of any other existing proposal. We argue that the president changed his mind in part because he did not want to be on the losing side of a major legislative battle. But more importantly, the president supported the massive new department in part to further domestic policy priorities unrelated to homeland security. By moving a large set of agencies within the department and instilling them with new homeland security responsibilities without additional budgets, the president forced these agencies to move resources out of their legacy mandates. Perversely, these goals appear to have been accomplished at the expense of homeland security.*

*Finally, we briefly discuss more general implications of our perspective: first, previous reorganizations (such as FDR's creation of a Federal Security Agency and Carter's creation of an Energy Department) also seem to reflect presidential efforts to enhance their control of administrative functions – including some not directly related to the stated purpose of the reorganization; and, second, our analysis raises questions about some of the most often-asserted justifications for judicial deference to agency legal interpretations.*

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## INTRODUCTION

Modern governments implement most legal mandates through bureaucracies. Politicians delegate authority by crafting legislative compromises. Lawyers and judges interpret their meaning. But bureaucratic agencies are often the entities that most directly wield the power to spend money, impose penalties, provide public services, and regulate individuals and organizations. Consequently, a central question in public law concerns who exactly controls the bureaucracy's power to interpret and execute law. Although legal scholars are consumed by normative debates concerning who *should* exercise such control, those debates are difficult to resolve or even follow in the abstract without some knowledge of the techniques used in the political process to control bureaucratic power over legal interpretations and over the execution of regulatory mandates.<sup>1</sup>

Surprisingly, the creation or reorganization of bureaucratic units – such as the new Department of Homeland Security (DHS) – remains among the least-understood such techniques.<sup>2</sup> We know politicians may create or reorganize agencies for multiple

<sup>1</sup> For just a few thought-provoking examples of this sprawling genre, see Cass Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, U. CHICAGO OLIN LAW & ECON. PAPER NO. 268, YALE L.J. (2006)(forthcoming); Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005); Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power Over Statutory Interpretation*, 96 NW. U. L. REV. 1239 (2002); Thomas W. Merrill and Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511.

<sup>2</sup> See, e.g., KAREN M. HULT, AGENCY MERGER AND BUREAUCRATIC REDESIGN 5 (1987)(“Despite the popularity of reorganization, the jury deciding its impact is still out – and is sharply divided”).

reasons: to appear as if they are addressing a salient policy,<sup>3</sup> to please organized interests most likely to be directly impacted by the agencies,<sup>4</sup> to create procedures that bias agency policy in particular directions,<sup>5</sup> and (perhaps more occasionally) genuinely to address a major problem of public concern in a prescriptively defensible manner.<sup>6</sup> We know far less, however, about how these different potential motivations interact, or how agency structure is affected by major crises such as the September 11 terrorist attacks. Importantly, we remain ignorant about precisely how and why politicians allocate different chunks of legal responsibility to distinct bureaucratic units.<sup>7</sup>

These gaps are evident in the persistence of certain puzzles about the largest government reorganization in a half-century – the creation of the DHS.<sup>8</sup> For instance, why did the President support the creation of DHS after initially opposing it? Why did the agency become so vast, including in the reorganization a wide range of components with little or no responsibility for homeland security? We also understand little about whether the crisis enabled or forced politicians to forge a bureaucracy that actually enhanced the government's capacity to undertake security-related functions. Even as the creation and operation of DHS continues to inspire controversy, policymakers and scholars have yet to address these questions.<sup>9</sup> Nor have they been resolved in the wide-ranging criticisms leveled at DHS following the Katrina disaster, or in light of the national security threats the Department was nominally designed to address.<sup>10</sup>

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<sup>3</sup> See JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (1995); R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* (1990).

<sup>4</sup> See Terry M. Moe and Scott A. Wilson, *Presidents and the Politics of Structure*, 57 *LAW & CONTEMP. PROBS.* 1 (1994); Barry R. Weingast, *Regulation, Reregulation, and Deregulation: The Political Foundations of Agency Clientele Relationships*, 44 *LAW & CONTEMP. PROBS.* 147 (1981).

<sup>5</sup> McCubbins, Mathew D., Roger G. Noll, and Barry R. Weingast. "Administrative Procedures as Instruments of Political Control," *Journal of Law, Economics, and Organization* 3 (Fall 1987): 243-77.

<sup>6</sup> AMY B. ZEGART, *FLAWED BY DESIGN: THE EVOLUTION OF THE CIA, JCS, AND NSC* (discussing how the structure of the Joint Staff, through the Goldwater-Nichols reforms, was engineered to be more functional than it had been before).

<sup>7</sup> See, e.g., DAVID E. LEWIS, *PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY, 1946-1997* (2003) (emphasizing the extent of uncertainty regarding why presidents choose specific designs for agencies and reorganization plans); JAMES Q. WILSON, *BUREAUCRACY* 265 (1989) (discussing the difficulty in assessing the range of motivations for specific reorganization plans given that "presidents have taken to reorganizations the way overweight people take to fad diets...").

<sup>8</sup> Regarding the size and scope of the reorganization that resulted in DHS, see Donald F. Kettl, *Overview in THE DEPARTMENT OF HOMELAND SECURITY'S FIRST YEAR: A REPORT CARD 1* (Donald F. Kettl, ed. 2004) ("[A]t its inception on March 1, 2003, the DHS brought together twenty-two federal agencies and more than 170,000 employees – the largest restructuring since the creation of the Department of Defense in 1947").

<sup>9</sup> For a cogent account of the creation of DHS that nonetheless fails to address these questions, see DONALD F. KETTL, *SYSTEM UNDER STRESS: HOMELAND SECURITY AND AMERICAN POLITICS* (2004). Although Kettl notes that the President shifted his position regarding the creation of DHS, he does not address why the President proposed such a massive reorganization. Nor is his explanation of the President's change in position, which focuses on events such as the testimony of FBI whistleblower Colleen Rowley, entirely convincing (the President changed positions on the creation of DHS well before Rowley's congressional testimony).

<sup>10</sup> For criticisms involving the response of DHS and its bureaus to Katrina, see, e.g., DOUGLAS BRINKLEY, *THE GREAT DELUGE* 227-278 (2006); for criticisms of DHS, see, e.g., Eric Lipton and Matthew L. Wald, *Focused on 9/11, U.S. Is Seen to Lag on New Threats*, *N.Y. TIMES* A1, August 12, 2006; Spencer Hsu,

The colossal new DHS melded the functions of twenty-two previously-existing agencies, from Treasury's Customs Service, to Agriculture's Plum Island Animal Disease Center, to the previously independent Federal Emergency Management Agency (FEMA). Upon its creation, the department gained regulatory authority over transportation security and matters as disparate as marine ecosystems and the migration of refugees. Its ranks swelled with nearly a quarter of a million federal employees ranging from border inspectors to environmental compliance officers. Nothing of this scope had happened in the United States since the creation of the Department of Defense a half-century earlier.<sup>11</sup>

Even for reorganizations of smaller scope than that of the DHS or the Defense Department, the structural changes are unlikely to be symbolic, devoid of legal and policy consequences. Such an assumption ignores the aggressive infighting over structure among legislators, the executive branch, and organized interests.<sup>12</sup> Ignoring the significance of changes in bureaucratic structure also neglects the findings of work in political science and sociology,<sup>13</sup> and the legal doctrines vesting valuable discretion in specific administrative agencies.<sup>14</sup> Yet we are only beginning to understand precisely how changes in structure shape the implementation of legal mandates, and how that significance would affect legislative bargaining over the contours of agencies such as DHS.

We propose to address these questions by combining a detailed analysis of the legislative process creating DHS with a new theory of the impact of bureaucratic structure on the execution of legal mandates. Our theoretical approach extends existing accounts of bureaucratic structure to address key features of the DHS case that also arise in other cases of bureaucratic change – especially the role of crisis in loosening the constraints of organizational interests and the impact of senior legislators guarding their committee jurisdiction.<sup>15</sup> In the process, our analysis fills several gaps in the legal and

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*DHS Terror Research Agency Struggling*, WASH. POST A8, August 20, 2006. See also sources cited *infra* Part III.e.

<sup>11</sup> See Kettl, *Overview*, *supra* note 8.

<sup>12</sup> See Zegart, *Flawed By Design*, *supra* note 6; PETER SZANTON, *FEDERAL REORGANIZATION: WHAT HAVE WE LEARNED?* (1981); RICHARD POLENBERG, *REORGANIZING ROOSEVELT'S GOVERNMENT: THE CONTROVERSY OVER EXECUTIVE REORGANIZATION 1936-1939* (1966). In a related vein, Scholars of race, property, education, and economic geography would naturally question the analogous assumption that changes in geographic lines of territorial jurisdiction – where one city or county ends and another begins – are of little consequence. For an insightful discussion of the path-dependent social impact of territorial subdivisions, see Richard Thompson Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843 (1999).

<sup>13</sup> Regarding the impact of structure on organizational culture, see David M. Kreps, *Corporate Culture and Economic Theory*, in *Perspectives on Positive Political Economy* 90, 109-10 (James E. Alt & Kenneth A. Shepsle eds., 1990); CHARLES PERROW, *COMPLEX ORGANIZATIONS* (1991). MORE GENERALLY, SEE: Terry Moe, "Political Structure of Agencies," in John E. Chubb and Paul E. Peterson, eds., *Can the Government Govern?* (Washington, DC: The Brookings Institution, 1989). For a review of the political science and political economy literature on the political implications of bureaucratic changes, see Barry R. Weingast, *Caught in the Middle, Caught in the Middle: The President, Congress, and the Political-Bureaucratic System* in *THE EXECUTIVE BRANCH* 312 (Joel D. Aberbach and Mark A. Peterson, eds. 2005).

<sup>14</sup> See Jerry Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501 (2005)

<sup>15</sup> Existing work in political science, and particularly in the field of positive political theory, provides important insights into how political officials use various *ex ante* and *ex post* techniques to control bureaucratic policy implementation; in particular, how they use bureaucratic structure to serve their

political science literature concerning matters, such as how reorganizations differ from familiar procedural techniques for controlling the bureaucracy, including environmental impact requirements or cost benefit analyses; how reorganizations may be enacted despite their adverse impact on the performance of widely-held goals; and how presidents, legislators, and organized interests sometimes bargain about bureaucratic structure in the shadow of an engaged, rather than disconnected, mass public.

As crises create windows of opportunity for legislative action, presidents gain an opportunity to assert greater control over statutory interpretation and discretion to administer regulatory powers by weakening the countervailing interest group and legislative dynamics that would ordinarily work against enhancements of executive power. In the midst of public pressures for legislative changes, policy changes in the area of concern – in our case, homeland security – can be driven by the efforts of politicians to affect regulatory and administrative activities in a different domain. Changes in security policy may powerfully affect other legal and policy domains, such as the Coast Guard's environmental regulatory functions, or the application of immigration laws. Second, politicians use the occasion of legislation to force changes elsewhere having little to do with principal issue being addressed.<sup>16</sup> While these themes are particularly relevant in the context of national and homeland security, they also hold important implications for the more often-studied aspects of bureaucratic politics, affecting domains such as pharmaceutical and environmental regulation and (as painfully demonstrated by the response to Hurricane Katrina) federal emergency disaster relief.

Against this theoretical backdrop, our account also yields answers to the DHS-specific questions about the Administration's decision to support reorganization and to pursue it on such a massive scale. We argue that the President changed his mind in part about the reorganization because he did not want to be on the losing side of a major issue. But more importantly, he supported reorganization that included a massive new department to further domestic policy priorities independent of homeland security. By moving a large set of agencies to the new department, and giving them new homeland security responsibilities without the promise of additional budgets, the President forced these agencies to draw resources away from their legacy mandates.

Though such changes have unquestionably become part of the President's own legacy, fixing the precise extent to which he and his top advisers consciously schemed to weaken domestic administrative and legacy mandates without regard for a corresponding homeland security benefit must await the judgment of history. But our analysis does establish three crucial realities. *First*, the Administration eventually pressed for the largest possible Department despite the security-related risks of the merger identified by

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political goals. There is a wide-ranging literature on this topic in political science and, more recently, in positive political theory and the law. *See infra* Part II.

<sup>16</sup> Examples abound. For instance, in dealing with the savings and loan crisis, Congress allowed the magnitude of losses from savings and loans to rise by failing to produce legislation in 1986. The conflict stemmed from differences in what add-ons should be included to the legislation, such as housing benefits or unrelated features of bank regulation. Similarly, the major savings and loan bailout legislation in 1989 greatly increased the costs of dealing with that crisis by prescribing other benefits as part of the legislation, notably, housing and urban redevelopment. See Thomas Romer and Barry R. Weingast, *Political Foundations of the Thrift Debacle*, in *POLITICS AND ECONOMICS IN THE EIGHTIES* \_\_ (Alberto Alesina and Geoffrey Carliner, eds. 1991).

some of the Administration's own aides. *Second*, many of the key players participating in or affected by the Department's creation – including legislators and bureau employees – explicitly grasped how the merger threatened legacy mandates. *Third*, key features in the legislative progression culminating in the creation of DHS – in particular, the President's pledge of revenue neutrality and the White House's willingness to consider including agencies such as the Nuclear Regulatory Commission and the Federal Aviation Administration – make little sense without assuming that the White House harbored the goal of affecting the performance of legacy mandates, even if doing so failed to yield a corresponding security benefit. In light of these realities, one suspects it would have proven more taxing for senior Administration officials to be willfully blind about the merger's effect on legacy mandates than it would have for them to count on those effects.

From a prescriptive point of view, our conclusions are sobering. Our analysis shows how the merger adversely affected even those legal mandates plainly relevant to homeland security.<sup>17</sup> More generally, decisions about whether to create a new security agency, what scope and size to give it, and how to organize congressional jurisdiction over it are unlikely to have been driven by meaningful prescriptive concerns. Yet such decisions are also unlikely to be merely *symbolic*. They can powerfully – and covertly – reshape how laws are implemented while making it more difficult for government to achieve broadly-shared prescriptive goals. Marginal improvements depend on solving problems of legislative oversight, and on whether competent bureaucrats will improbably succeed in forging autonomy and capacity in a world unlikely to support it. While these scenarios remain elusive, our analysis does not yield a blanket condemnation of bureaucracies created through high-profile reorganizations. Bureaucracies forged in crisis may not be inexorably doomed to fail in carrying out their legal responsibilities, and there may yet be reasons to defer to their legal interpretations. Instead, we highlight the difficulties in averting such failure.

Our argument proceeds as follows. Part I presents the homeland security story since just before September 11. Part II develops our theory of bureaucratic organization and performance, with an emphasis on policy change in response to crises. Part III applies the theory to the creation of DHS and related legislative enactments, providing empirical support for the theoretical conclusions. Our purpose there is not merely to demonstrate how the architecture of DHS was politicized, but to elucidate more specifically in what manner political considerations shaped the agency's structure, and to what effect. We conclude by discussing promising avenues for further research and noting that the prospects for improving homeland security depend crucially on understanding the political forces that constantly pervade, and often warp, the work of organizations entrusted with this crucial mandate.

## I. THE EVOLUTION OF HOMELAND SECURITY AFTER SEPTEMBER 11

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<sup>17</sup> See *infra* Part III.e., Conclusion. Our claim is not that DHS is entirely dysfunctional, or that it is responsible for the full extent of the disaster following the flooding in New Orleans that resulted from Hurricane Katrina. Instead we contend that the prescriptive case for the creation of DHS is unpersuasive, that its creation entailed transition costs of uncertain duration and extent (a fact recognized even by many of its proponents), and that a plausible case can be made that specific difficulties – such as those faced by the TSA or FEMA during and after the Katrina crisis – were exacerbated by the creation of DHS. Regarding the background degree of expert uncertainty permeating analyses of the policy implications of particular legal and policy changes, see PHILIP E. TETLOCK, *EXPERT POLITICAL JUDGMENT* (2005).

Public bureaucracies decide where dams are built, whether nuclear power plants will add to energy production, how intelligence operations are conducted, who gets turned away at the border, and what environmental standards must be met. As with the imaginary lines that subdivide metropolitan areas into distinct jurisdictions, enormous practical significance flows from the legal rules allocating power among bureaucracies. Lurking behind the design of those rules may be a complex political story.

In this Part, we begin tracing such a story, describing the interwoven origins of DHS and the Homeland Security Act (HSA), the sprawling statute from which the new department was forged. We discuss the political context and substance of Act at length for two reasons. *First*, our story contrasts with certain canonical descriptions of legislative developments following the September 11 terrorist attacks, which tend to emphasize resolute presidential leadership and relative legislative passivity.<sup>18</sup> In contrast, our account reveals presidential policy reversals, the centrality of congressional bargaining even in the midst of a crisis, and the resulting statutory intricacies governing the new cabinet agency. *Second*, certain puzzles emerge from the story of the Act and the Department, setting the stage for our analysis in the sections that follow.

#### A. *The Status Quo Before September 11*

The end of the Cold War dramatically affected debates about American security. By the middle of 2001 American policymakers discussing security had replaced references to a balance of power, containment, and mutually assured destruction, focusing instead on terrorism, asymmetric warfare, and above all “homeland security.”<sup>19</sup> Terrorist attackers had struck several times during the previous eight years, most notably at the World Trade Center in 1993 and in Oklahoma City in 1995.<sup>20</sup> In response, the new president-elect created a structure within the White House National Security Council to coordinate matters involving terrorism, its prevention, and the nation’s ability to prepare and respond to such attacks. Unlike previous directives, the focus was primarily on attacks targeting the United States itself.<sup>21</sup>

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<sup>18</sup> See, e.g., Julie Mason, *White House Watch: Burnout on the Bush Team?*, HOUSTON CHRON. A14, March 19, 2006, avail. at 2006 WLNR 4564959 (observing that after September 11, Congress kept a “rubber stamp” on hand for the White House); Lewis H. Lapham, *Exit Strategies*, HARPER’S MAG. 7 (January 1, 2006)(emphasizing the extent to which the post-September 11 era appears to involve “a cowed legislature”).

<sup>19</sup> The term was generally taken to refer to the security of the American homeland, its infrastructure and its population from a full range of manmade threats See FIRST ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS OF THE ADVISORY PANEL TO ASSESS DOMESTIC RESPONSE CAPABILITIES FOR TERRORISM INVOLVING WEAPONS OF MASS DESTRUCTION 7 (1999)(discussing funding for “domestic preparedness and homeland defense”), avail. at <http://www.rand.org/nsrd/terrpanel/terror.pdf> (last accessed June 19, 2006); U.S. COMMISSION ON NATIONAL SECURITY IN THE 21<sup>ST</sup> CENTURY, SEEKING A NATIONAL STRATEGY: A CONCERT FOR PRESERVING SECURITY AND PROMOTING FREEDOM 14 (2000)(describing “homeland defense” as a preeminent security goal), avail. at <http://www.au.af.mil/au/awc/awcgate/nssg/phaseII.pdf> (last accessed June 19, 2006). The reports of these high-level blue-ribbon panels contrast sharply with the prevailing rhetoric describing U.S. national security challenges a mere 15 years earlier. Compare Office of the Secretary of Defense, U.S. Dep’t of Defense, Quadrennial Defense Review (1996)(failing to emphasize terrorism or homeland security as preeminent security challenges), avail. at <http://www.fas.org/man/docs/qdr/>, last accessed June 19, 2006.

<sup>20</sup> See REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 71-102 (2004)(“Commission Report”).

<sup>21</sup> See *id.*

The perceived need for coordination arose in part from the existence of numerous bureaus with responsibilities relevant to preventing, preparing for, and responding to manmade threats against the United States.<sup>22</sup> For instance, homeland security encompassed aspects of the work of the Departments of State and Defense, as well as the National Security Council.<sup>23</sup> Rounding out the coterie of national security bureaucracies were agencies devoted to intelligence, criminal investigation, and prosecution. The CIA's explicit core function of intelligence combined with its covert operations.<sup>24</sup> By 2001, it had multiple task forces working on terrorism-related issues, and an elaborate group focused almost entirely on Osama Bin Laden and al Qaeda.<sup>25</sup> Specialized intelligence entities, such as the National Security Agency, further complemented these activities by engaging in electronic eavesdropping outside the United States and gathering considerable signals intelligence. Homeland security and terrorism prevention were also considered the province of federal special agents and the law enforcement agencies for which they worked. As hearings in three Senate committees during the week of May 7, 2001 demonstrated, law enforcement agencies were routinely considered to be responsible for protecting the American public.<sup>26</sup> The FBI commanded vast budgets and statutory responsibility, serving as the lead counter-terrorism law enforcement agency.<sup>27</sup> Foreign attacks on American interests, such as the bombing of the U.S.S. Cole in Yemen, invariably led to the deployment of an FBI team.

Several bureaus with regulatory, enforcement, and administrative responsibilities also performed missions relevant to homeland security. A host of specialized law enforcement agencies existed, such as the Immigration and Naturalization Service (INS) and the Drug Enforcement Administration (DEA). The INS served multiple inspection, detention, investigation, quasi-adjudication, and policy functions related to controlling the flow of people into the country. Customs had the similarly daunting task of preventing prohibited items, from drugs to explosives, from entering.<sup>28</sup> Within the U.S.

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<sup>22</sup> See generally *id.*; U.S. GOVERNMENT MANUAL (2000)(describing separate law enforcement, national security, and disaster relief missions for different government agencies). The identification of "homeland security" primarily with terrorism and similar manmade threats is derived from the Bush Administration's own budget analyses. See, e.g., Budget of the United States 23 (2003), avail. at <http://www.gpoaccess.gov/usbudget/fy03/pdf/bud05.pdf> ("To develop the homeland security budget, the Office of Homeland Security... identified those activities that are focused on combating and protecting against terrorism and occur within the United States and its territories.")(emphasis added). By using this definition, we do not mean to imply that it is a reasonable one. Indeed, as indicated by our discussion below on Hurricane Katrina in Part III.e and our analysis of the prescriptive merits of the Department's creation, there are considerable grounds for questioning the exclusion of major natural disasters from the definition of homeland security.

<sup>23</sup> See Commission Report, *supra* note 21, at 93-102.

<sup>24</sup> See *id.* at 88-91.

<sup>25</sup> See RICHARD A. CLARKE, *AGAINST ALL ENEMIES* 167-171 (2004).

<sup>26</sup> The Senate Armed Services, Appropriations, and Intelligence committees held hearings analyzing the work of the approximately forty different agencies responsible for combating domestic terrorism. See, e.g., *Testimony of Paul H. O'Neill, Secretary of the Treasury, Before the Senate Committee on Appropriations, Subcommittee on Commerce, State, and the Judiciary*, 2001 WL 47932 (F.D.C.H., May 8, 2001).

<sup>27</sup> See Commission Report, *supra* note 21, at 74 ("For countering terrorism, the dominant agency under Justice is the Federal Bureau of Investigation"). *Id.* at 82 ("[T]he FBI and the justice Department... took on the lead role in addressing terrorism because they were asked to do so").

<sup>28</sup> Customs was also responsible for trade-related revenue collection and the implementation of hundreds of legal mandates related to trade regulation. See *Customs Service: Comments on Strategic Plan and Resource Allocation Process*, Testimony of Norman Rabkin, Director, Admin. of Justice Issues, General



Treasury Department, Customs had the largest budget, staff, and responsibility. Like INS, it performed more than just investigative functions (e.g., tracking down money launderers, drug traffickers, and illicit brokers of technology subject to export controls). It also played a regulatory function. While INS regulated the entry of people, Customs controlled the vast flow of goods into (and, in theory, out of) the United States. The Secret Service investigated counterfeiting and fraud-related financial crimes in addition to serving its most visible role of protecting the President. In addition to collecting excise taxes, the Bureau of Alcohol, Tobacco, and Firearms had become a law enforcement agency focused on firearms and explosives, with a wealth of technical expertise on these subjects unrivalled elsewhere in the federal government.<sup>29</sup>

Transportation and coastal security were handled largely through a tangle of overlapping functions nominally overseen from within the federal Transportation Department. The FAA looked after security of the aviation infrastructure, imposing (among other things) mandates on airlines and airports requiring them to pay for employees to screen passengers and their luggage. The Coast Guard similarly shared with Customs responsibility for key aspects of port security. It also performed coastal search and rescue operations along with a multitude of safety, rate-setting, and environmental regulatory functions.<sup>30</sup>

Presumably, the work of these agencies could forestall a disaster that would have had to be handled by emergency response bureaucracies, who together formed the final pillar of homeland security – emergency response.<sup>31</sup> Of these, FEMA was the most important. In addition to fielding emergency response teams and serving as a conduit for disaster relief money, FEMA also encompassed insurance programs to help mitigate the longer-term impact of various natural disasters.<sup>32</sup>

Three features of the status quo characterized this mix of national security, law enforcement, regulatory, and disaster relief capability that would later be catalogued under the homeland security label. *First*, policymakers assumed homeland security bureaucracies to be capable of operating reasonably effectively even though they had largely separate reporting structures and bureaucratic identities. Though some legislators and independent commissions complained about the fragmentation of responsibility for security-related problems, legislators tolerated the decentralization of bureaucratic power over national and homeland security.<sup>33</sup> *Second*, the description of agencies above demonstrates that virtually *every* bureaucratic unit that had a role to play in homeland security also had separate functions – such as INS’ role in providing immigration services

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Government Division, GAO T-GGD 98-15 (Oct. 16, 1997), avail. at <http://www.gao.gov/archive/1998/gg98015t.pdf>.

<sup>29</sup> See Commission Report, *supra* note 21, at 82 (“The ATF’s laboratories and analysis were critical...”).

<sup>30</sup> See U.S. Government Manual 308-335 (2000).

<sup>31</sup> See *id.*

<sup>32</sup> See Wamsley, Gary L. and Aaron D. Schroeder, Escalating in a Quagmire: The Changing Dynamics of the Emergency Management Policy Subsystem, 56 PUB. ADMIN. REV. 235 (1996). These efforts complement those of state and local responders who are likely to nearly always be the first on the scene and to make up the bulk of the people responding to a terrorist attack. See Charles R. Wise and Rania Nader, Organizing the Federal System for Homeland Security: Problems, Issues, and Dilemmas, 62 PUB. ADMIN. REV. 44, 46 (2002).

<sup>33</sup> See *House Speaker Forms Terrorism Panel*, AERO. DAILY & DEF. REP’T 254, 2001 WLNR 2059324 (February 15, 2001).

– that were different in scope and therefore potentially in conflict with security. *Finally*, enormous variation existed in the degree of coordination across relevant units. Some problems were undeniable, such the relationship between the FBI and the CIA (and, for that matter, between the FBI and just about everyone else). But there were also apparent successes, as when federal officials foiled a plot to bomb traffic tunnels leading into New York City and some of its major landmarks.

### *C. Shocks and Responses: The Immediate Aftermath.*

The administration's initial response to the September 11 attack focused on proposing substantive legal changes. Working groups at the Justice Department soon pulled together legislative proposals from preceding years to fashion an outline of what would become the USA Patriot Act.<sup>34</sup> The President also used his executive powers that could be deployed without legislative approval. The White House supported federal agents' aggressive use of immigration and material witness authority to detain scores of people almost immediately following the attacks, and the President used his authority under the International Emergency Economic Powers Act (IEEPA) to block the assets of various individuals and organizations suspected of being tied to terrorists.<sup>35</sup>

The White House staff also oversaw the implementation of two noteworthy changes in organizational structure, though its approach to each of demonstrated a great deal of caution about major changes in the allocation of bureaucratic jurisdiction. On October 8, using existing statutory authority, the President created the position of homeland security advisor within the Executive Office of the President, and appointed Pennsylvania Governor Tom Ridge to fill it. Ridge sought to build a structure around his position to match the President's ambitious rhetoric that the new Office of Homeland Security would "coordinate" policy by staffing a Homeland Security Council paralleling the structure of the National Security Council.<sup>36</sup>

An implicit presumption that underlay the creation of Ridge's office concerned the value of coordinating separate agencies mixing homeland security missions with other functions. A gap was presumed to exist not only in the provision of advice, but in the extent of coordination among a great many agencies and bureaus.<sup>37</sup> White House officials believed that success in the arena of homeland security depended on enhancing such coordination.<sup>38</sup> Ridge sought to provide that coordination, or at least the trappings

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<sup>34</sup> So eager was the Department to craft the new bill that Attorney General Ashcroft discussed it on Sunday morning talk shows before even the Chairman of the House Judiciary Committee or the White House Counsel's Office had any copies of the proposal. See STEVEN BRILL, *AFTER: HOW AMERICA CONFRONTED THE SEPTEMBER 12 ERA* (2003).

<sup>35</sup> See *id.*

<sup>36</sup> See Kettl, *Systems Under Stress*, *supra* note 9, at \_\_; Brill, *supra* note 21, at 54 (noting how presidential advisers characterized their agenda as "not to reorganize all those agencies, but to hire a heavyweight to come work in the White House and *coordinate* them"); Tom Ridge, *U.S. is More Secure*, *USA TODAY* 11A (February 2, 2004).

<sup>37</sup> For a discussion of the potential benefits and costs of centralized control, see *infra* Part II. For an interesting exploration of those benefits and costs in the context of intelligence agencies, see Anne Joseph, *The Architecture of Smart Intelligence: Balancing Unification and Redundancy in Agency Design and Congressional Oversight*, 94 CAL. L. REV. (2006)(forthcoming).

<sup>38</sup> It is worth noting that in this context, the definition of "success" is not obvious. Possibilities include: (a) measurable improvement in homeland security (traditionally defined to encompass manmade threats from both nonstate actors and more conventional geostrategic actors), (b) with neutral or positive political

of it. But even delivering the image of greater coordination to the public proved daunting. The National Counterterrorism Coordinator structure set up at the NSC now had a mandate overlapping that of the new Homeland Security Office. There were no precedents for how to resolve the potential jurisdictional conflicts, nor was it obvious precisely what it meant for Ridge to coordinate, what his role would be in a crisis, or whether the conflict between the NSC and the HSO would prove a major impediment to the goal of coordination.<sup>39</sup>

Sensing disarray, some legislators insisted that the new Homeland Security Advisor should be subject to Senate confirmation and have statutory powers over budgets. Senator Bob Graham, a Democrat from Florida, introduced S1449 to transform Ridge's entity into a new National Office for Combating Terrorism to achieve the aforementioned purposes. Other legislators went even further, reiterating occasional calls made earlier by selected legislators and blue-ribbon commissions for the creation of a new cabinet department focused on domestic security.<sup>40</sup>

The President opposed these efforts. Instead, White House aides emphasized the advantages of the status quo: no department, and a staff office to coordinate homeland security. From October 2001 until at least March of 2002, the President's Press Secretary insisted that creating a cabinet department was unnecessary, and possibly counterproductive.<sup>41</sup> Unfortunately for the White House, the performance of the new Office during the anthrax attacks questioned the President's argument that coordination had been sufficiently bolstered by the creation of Ridge's Office. During the anthrax episode, some observers described Ridge's response as tentative and uncertain.<sup>42</sup> Despite the new Homeland Security Advisor's declaration that he was in charge of the response, Health and Human Services Secretary Tommy Thompson appeared to contradict Ridge. During this period, despite the absence of formal budget authority, Ridge pressed for, and helped the White House achieve, a \$1.2 billion increase in the immigration enforcement budget.<sup>43</sup>

A second structural change took shape in discussions between Congress and a reluctant White House regarding the creation of a new federal bureaucracy to consolidate

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payoffs with the mass public, and (c) no corresponding, politically costly reduction in the effectiveness in whatever else the government's doing. Gauging success is complicated because the absence of attacks does not imply success. What can be said is that if there's a plausible argument for what structural changes were supposed to accomplish in homeland security, it would probably be something along the lines that's just been described. Anything different from that would require some detailed justification that might ultimately unconvincing on normative grounds. And these goals were also ultimately grounded in the Homeland Security Act. *See generally* Department of Homeland Security, Office of the Inspector General, *Major Management Challenges Facing the Department of Homeland Security*, EXCERPTS FROM THE FY 2005 DHS PERFORMANCE AND ACCOUNTABILITY REPORT (Dec. 2005).

<sup>39</sup> See Brill, *supra* note 21, at 54 ("[T]hat coordinating would be a lot harder than it sounded"); Kettl, *Systems Under Stress*, *supra* note 9, at \_\_\_\_.

<sup>40</sup> See Alison Mitchell, *A National Challenge: The Security Chief – Disputes Erupt on Ridge's Needs for His Job*, N.Y. TIMES p. 7 (Nov. 4, 2001).

<sup>41</sup> See Transcript of Ari Fleischer, White House Press Secretary, Press Briefing, Oct. 2, 2001.

<sup>42</sup> See Victoria Sutton, *Biodefense: Who's In Charge?* 13 Health Matrix 117 (2003).

<sup>43</sup> The Coast Guard also received a funding increase of \$282 million in 2002. (Thessin, 2003). *See also infra* Part III (discussing the pressures interfering with continued performance of the Coast Guard's legacy missions following the creation of the Department of Homeland Security).

responsibility for transportation security.<sup>44</sup> With its creation in 2002, the Transportation Security Agency (TSA) assumed complicated responsibilities over the security of the nation's transportation infrastructure.<sup>45</sup> The White House initially opposed the idea. The President preferred to forego creating a new bureaucracy and to keep the screeners private. Whether that opposition was rooted in ideology or in concern for the organized interests likely to be affected, the Administration later abandoned its reluctance and endorsed the idea. Some observers with access to the deliberation now report that the Administration's acquiescence reflected not only mounting pressure from congressional Democrats but also the recognition that the mass public was unlikely to trust private screeners given their inability to prevent the hijackings.<sup>46</sup> The new law placed TSA within the Transportation Department. The new agency's creation was also accompanied by an initial dismemberment of the FAA's security capacity (bitterly opposed by FAA), lodging it elsewhere at Transportation.

#### *D. Initial White House Resistance to Reorganization*

Well before September 11, a number of legislators and blue-ribbon commissions had called for consolidating some agencies with a homeland security mandate in a cabinet-level agency.<sup>47</sup> Various plans on Capitol Hill focused on three functions: border security and enforcement, disaster response functions relevant to terrorist attacks, and policymaking activities to facilitate the prevention of attacks.<sup>48</sup>

Following the attacks, Senator Joseph Lieberman, then serving as Senate Governmental Affairs Committee Chair, re-introduced legislation to centralize certain government functions into a single homeland security department. While some Republican legislators, such as Arlen Specter, expressed some interest, the President did not. He believed that such consolidation would constitute a waste of time at best. On March 19, 2002, for instance, in response to a questioner who asked about "[w]hy... the White House continue[s] to resist the idea of making the Office of Homeland Security a Cabinet-level department," Press Secretary Ari Fleischer insisted that:

I'm not aware of a single proposal on Capitol Hill that would take every single one of those agencies [dealing with terrorism] out from their current missions and put them under Homeland Security. So even if you took half of them out and put them under a Cabinet level Office of Homeland Security, the White House would still need, in the President's estimation, an advisor on how to coordinate all the myriad of activities the federal government is involved in. So creating a Cabinet office doesn't solve the problem. You still will have agencies within the federal government that have to be coordinated.<sup>49</sup>

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<sup>44</sup> See Wendy Haynes, *Seeing Around Corners: Crafting the New Department of Homeland Security*, 21 REV. POL. RES. 369 (2004).

<sup>45</sup> See Kettl, *Systems Under Stress*, *supra* note 9, at \_\_\_\_.

<sup>46</sup> See Clarke, *supra* note 26, at 245; Kettl, *Systems Under Stress*, *supra* note 9, at \_\_\_\_; Brill, *supra* note 21, at 166 (noting "widespread media reports and public disgust about the low quality of the airport screening force").

<sup>47</sup> See Amy B. Zegart, *September 11 and the Adaptation Failure of U.S. Intelligence Agencies*, 29 INT'L SECURITY 78, 85-87 (2005).

<sup>48</sup> See Kettl, *Systems Under Stress*, *supra* note 9, at \_\_\_\_.

<sup>49</sup> Transcript of Ari Fleischer, White House Press Secretary, Press Briefing, March 19, 2002.

Several factors might have made the creation of a new department seem problematic from the President's perspective. The substantive benefits of a consolidation were not obvious, indeed, highly uncertain – a point to which we return below. Major changes were likely to provoke opposition from powerful legislators whose committees stood to lose some jurisdiction and from the interest groups they served.<sup>50</sup> Moreover, career officials and political appointees within the administration were likely to resist the transfer. Opposition among the bureaucracy could have proven politically costly to the President,<sup>51</sup> increasing the risk that reorganization would backfire and potentially exposing the Administration to criticism in the press or on Capitol Hill.<sup>52</sup> Critics of previous reorganizations had, after all, pointed out that they had created such problems in the past.<sup>53</sup> Finally, to the extent that prescriptive concerns mattered at all (something we explore and question below), they might cut sharply *against* the sort of reorganization that might seem superficially appealing to the public. Reorganizations almost inevitably cost money and create friction among people and organizations scrambling to understand the consequences of the new hierarchy under which they must work. Moreover, reorganizations create new authority structures that typically engender friction which hinders one of the main reasons for reorganization, namely, coordination.

Even in the midst of its crisis mode, White House aides may have appreciated certain risks inherent in taking responsibility for a massive reorganization. In the short run, there was a substantial chance that reorganization would actually decrease agencies' effectiveness in responding to security threats, at a time when the Administration almost certainly persist or grow. Though little is known about the impact of reorganizations on bureaucratic performance, it is widely acknowledged that performance suffers at the outset.<sup>54</sup> One account of the frantic days following September 11 underscores the extent to which these prescriptive concerns, intermingled with an appreciation of the political costs, *were* on the White House radar screen even two days after the terrorist attack:

By Thursday, Abbot, Kuntz, and Libby [aides to Vice President Cheney] had concluded that the first thing the Bush administration should do would be *not* to reorganize all those agencies, but to hire a heavy weight to come work in the White

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<sup>50</sup> Note that, if this were genuinely a concern, it might still be possible for the president to negotiate some agreement with the legislators in question.

<sup>51</sup> See Gurulé Interview, 2004.

<sup>52</sup> As an example of how Presidents might suffer such criticism of subordinates, consider Richard Clarke's account of the challenges the White House faced in achieving covert action from reluctant bureaucracies:

Whether it was catching war criminals in Yugoslavia or terrorists in Africa and the Middle East, it was the same story. The White House wanted action. The senior military did not and made it almost impossible for the President to overcome their objections. When in 1993 the White House had leaned on the military to snatch Aideed in Somalia, they had bobbed the operation and blamed the White House in off-the-record conversations with reporters and Congressmen. What White House advisor would want a repeat of that?

Clarke, *supra* note 26, at 145.

<sup>53</sup> See, e.g., Demetrios Caraley, *The Politics of Military Unification: A Study of Conflict and the Policy Process* (1966); Szanton, *supra* note 12; Wilson, *Bureaucracy*, *supra* note 7, at 264-67.

<sup>54</sup> See Brian Balogh, Joanna Grisger, and Philip Zelikow, *Making Democracy Work: A Brief History of 20<sup>th</sup> Century Federal Executive Reorganizations*, WORKING PAPER: UNIVERSITY OF VIRGINIA, MILLER CENTER FOR PUBLIC AFFAIRS 5 (July 22, 2002).

House and *coordinate* them, much the way Condoleezza Rice, the National Security Advisor, coordinated the various agencies involved in foreign and defense policy. They could never get all the agencies with some role in domestic security into one department, they reasoned, because so many also did so many other, unrelated jobs. (FEMA, for example, administers [sic] flood insurance in addition to coordinating the federal response to disasters.) The goal should be to coordinate whatever they did related to homeland security, rather than spend a lot of time and money dislodging them from their current departments.<sup>55</sup>

The White House emphatically followed that path, insisting that Ridge's office fit the bill, coordinating both the sprawling federal security apparatus and the thousands of local police and fire departments, from Manhattan to Minnesota to Manhattan Beach, still scrambling to enhance security in their local jurisdictions.<sup>56</sup>

Despite the Democrats' control of the Senate, Congress was broadly supportive of the President in the two months following the attack. The Administration achieved rapid passage of the Patriot Act and a resolution authorizing the use of force abroad in response to the attacks. Even individual Democratic legislators seemed initially inclined to cooperation. Senator Graham, for example, agreed to his proposed legislation. The extent of congressional support contributed to an impression of considerable (if not frantic) policy change and implementation. The Administration's burst of activity since September 11 – including the Patriot Act, the creation of a large new transportation security bureaucracy, the private sector's thrust to crack a new homeland security market, state and local officials' regional exercises, the invasion of a central Asian nation, and forging a new White House staff office – seemed to push the limits of what the nation's political machinery could digest in such a short time.

#### *E. Shaping a Reorganization and Striking Legislative Bargains*

But legislators were not entirely passive participants in the policymaking process. Emboldened by White House reluctance and public opinion surveys, a score of legislators called for a new cabinet department focused on homeland security.<sup>57</sup> White House aides thus encountered a more complex political terrain. By late October 2001, Lieberman in the Senate and Republican Mac Thornberry in the House led what had begun as an unlikely (if not downright outlandish) crusade to forge agencies into a new super-bureaucracy that began to pick up support among both Republican and Democratic legislators.<sup>58</sup> The response from the White House through the rest of 2001 and early 2002 remained an emphatic “no.”

This negative response was not, however, the last word from the White House. On

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<sup>55</sup> See Brill, *supra* note 21, at 54. The extent to which the President's aides summarily concluded that social insurance functions were unrelated to domestic security is consistent with the Administration's narrow identification of homeland security with terrorism. See *infra* note 22. Such a position contrasts with the approach taken by the Roosevelt Administration during the 1940s, where public officials relentlessly sought to link social insurance, public health, education, and regulatory programs to the goal of “security” and national defense. See *infra* notes 214-217 and accompanying text.

<sup>56</sup> See *id.* at 54-55 (describing the negative reaction of Vice President Cheney's aides to the prospect of creating a new department).

<sup>57</sup> See *infra* Part III (discussing results from surveys).

<sup>58</sup> See Haynes, *supra* note 45, at \_\_\_\_.

June 7, President Bush unveiled his own proposal for a new Department of Homeland Security.<sup>59</sup> Hints that something was in the works had appeared since April, when Budget Director Mitch Daniels publicly stated that the President could propose reforms at a later date.<sup>60</sup> What Daniels did not say was that the President had already set the process in motion. In late 2001 and early 2002, the President had several conversations with Ridge and Chief of Staff Andrew Card about the merits of creating a new department to administer homeland security.<sup>61</sup> Responding to congressional resistance to an earlier border consolidation plan, the president apparently noted the plan “seems kind of small to me,” and then added:

You know, maybe we should stop getting pecked to death like this. *Maybe its time to think big.* When you do something piecemeal, all the interests here come at you one by one and kill you. Let’s just make believe we are re-created the government from scratch and map out what we’d put in a new homeland department and then maybe we’ll go for it [emphasis added].<sup>62</sup>

By March, aides to Ridge, Card, and Daniels were holding secret meetings.<sup>63</sup> Participants in the meetings now suggest that their deliberations were driven largely by prescriptive concerns about the organizational merits of consolidating various units. The group was also driven by concerns about what could be sold on Capitol Hill, as underscored by the fact that the initial small group was soon expanded to include staff from the White House legislative affairs operation.

Although the limitations of sources describing these early meetings make it impossible determine the participants’ precise mix of concerns, the discussions soon yielded a rough picture of a department with two significant features. First, it would be significantly larger in scope and size than anything that had been proposed by the Democrats or previous independent commissions. “The PEOC group,” noted one commentator, “had now created a mega-agency that far exceeded Senator Lieberman’s relatively modest proposal for a Department of Homeland Security, and they weren’t finished.”<sup>64</sup> The working group demonstrated a willingness to contemplate an even larger department by their inclination to consider moving the FBI, the FAA, and ATF into the Department (moves that were ultimately rejected). Precisely why the White House process contemplated and produced such a sprawling department is not immediately clear, a matter to which we return in Parts II and III. Second, the PEOC group intended the new department to serve as a showcase for the value of flexibility in presidential control of personnel. The goal of watering down civil service protections appealed to the President’s aides, particularly Daniels.<sup>65</sup>

The 35-page legislative proposal that emerged from the meetings of the “PEOC group” sought to establish four primary “directorates” – border and transportation security, information analysis and critical infrastructure protection, science and

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<sup>59</sup> See STEPHEN FLYNN, AMERICA THE VULNERABLE 39 (2003); Brill, *supra* note \_\_\_, at \_\_\_.

<sup>60</sup> See Brill, *supra* note \_\_\_, at \_\_\_.

<sup>61</sup> See *id.*, at 397; Haynes, *supra* note 45, at \_\_\_.

<sup>62</sup> See Brill, *supra* note 21 at 397.

<sup>63</sup> See *id.* at 21.

<sup>64</sup> *Id.* at 449.

<sup>65</sup> See *id.*; Haynes, *supra* note 45, at \_\_\_.

technology, and preparedness and emergency response – at the core of the new department. It included provisions allowing the President to appoint over a half-dozen assistant secretaries without Senate confirmation, and sought to imbue the President with power to redistribute appropriations among several different agencies. It called on political appointees to rewrite civil service protections governing many of the agency's new employees and to replace them with a “flexible” system, presumably vesting greater power over career officials in the hands of political officials.<sup>66</sup>

The plan's starkest feature sought to move some 22 agencies into DHS, despite the fact that not all their functions conform to even the most expansive definition of homeland security. The marine environmental portions of the Coast Guard, for instance, were to be entirely absorbed by the new department, as were the revenue collection and trade enforcement functions of the Customs Service, and the agricultural regulatory functions of the Animal and Plant Health Inspection Service.<sup>67</sup>

In contrast, many previous proposals for the creation of a homeland security agency had contemplated more modest changes. For example, Republican Representative Mac Thornberry's pre-September 11 bill, introduced in March of that year, essentially contemplated moving FEMA, Customs, the Coast Guard and border patrol to the new agency.<sup>68</sup> Unlike the President's plan, agencies like the Secret Service, APHIS, the investigative and regulatory functions of immigration authorities, health related functions such as the national vaccine stockpile, and Treasury's Federal Law Enforcement Training Center were left untouched.<sup>69</sup> The reorganization's mixing a wide range of legacy missions with new homeland security responsibilities raised the question of how the tradeoffs were to be made across these missions.<sup>70</sup>

A flurry of activity followed the White House's June 7 announcement. The White House briefed Cabinet members (many of whom were just learning about the plan at that point) and legislative leaders. The President's aides spoke to the media. And at 8pm Eastern Time, the President spoke to the nation about the plan.<sup>71</sup> The elaborate roll-out confirmed that the President and his staff were now not only joining the chorus of support for the reorganization but sought to lead the reorganization drive. The building blocks of the new proposal broke from past plans in the larger scope of agencies to be included and in the provisions weakening civil service rules. Despite these differences, publicly the plan was premised on the same logic that the alternatives were: the value of centralization.

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<sup>66</sup> See, White House, Proposed Homeland Security Act (June 2002)(“President's Plan”)(on file with author).

<sup>67</sup> See Eli Lehrer, *The Homeland Security Bureaucracy* 4 (Spring 2004). How FEMA is classified depends, of course, on the extent that one views responses to accidental and natural disasters as a component of homeland security. Doing so is certainly plausible. Below we note how some of the prescriptive problems associated with the creation of the new department may involve the adverse impact of focusing on a particular type of manmade security problem (terrorism) at the neglect of others.

<sup>68</sup> See HR 4660 (introduced by Mac Thornberry)(June 24, 2002).

<sup>69</sup> See HR 1158 (March 21, 2001).

<sup>70</sup> Note how the relevance of this question can be understood in at least two ways: either because the legislation itself allows for some flexibility or because, as a practical matter, it allows for department executives to retain some discretion. On the other hand, political pressures would be quite likely to encourage a DHS executive to focus on terrorism because that's the issue that would be most likely to be used to judge her. Cf. Wilson, *Bureaucracy*, *supra* note 7, at \_\_\_\_.

<sup>71</sup> See Brill, *supra* note 21, at 486.



Behind the scenes, several factors may have helped dissipate the Administration's previous resistance. Its legislative affairs staff documented rising support for consolidation among legislators.<sup>72</sup> Security issues almost certainly continued holding much of the public's attention, particularly given the congressional testimony of FBI "whistleblower" Colleen Rowley, who had unsuccessfully sought to get authority to search the computer of alleged terrorist Zacarias Moussau, and continued public debate about whether an independent commission would ultimately be created to investigate the September 11 attacks.<sup>73</sup> The White House opposed that Commission too. It might have seemed politically risky to the President and his aides to oppose the new department and an independent commission heading into the midterm congressional elections. In addition, creating a new department may have had particularly strong political salience because of its appeal to latent, if potentially superficial, notions of effective governance.<sup>74</sup> But these developments fail to account for the choices the White House made regarding the size, scope, and prescriptive merits of the new agency.

The President's June announcement found Congress still mired in divisions about the merits of creating a new department. Support remained vigorous among members of the Senate Government Affairs committee, whose members had proposed renaming the committee "Homeland Security and Governmental Affairs" almost certainly stood to gain prestige, power, and influence to gain if their expectation were fulfilled and the new department was put under their jurisdiction. At the same time, a stubborn core of opposition persisted among lawmakers who had committee jurisdiction to lose, or who saw position-taking opportunities in opposing substantive civil service changes, earmarks, and liability protections in the President's proposal.<sup>75</sup>

With both the President and a growing number of legislators supporting the broad goal of the department's creation, there followed a period of intense bargaining. In the House, Speaker Hastert and the Republican leadership created a two-track process to evaluate the bill, christened the "Homeland Security Act." Over a dozen committees with existing jurisdiction over various aspects of homeland security would mark up the bill, but their votes would be considered advisory in nature. Meanwhile, Hastert would empanel a Select Committee on Homeland Security, including most of the chairs of

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<sup>72</sup> See Clarke, *supra* note 26, at 250.

<sup>73</sup> See Commission Report, *supra* note 21.

<sup>74</sup> Some bureaucratic reforms may be easier to explain to the public, regardless of whether they are in fact more likely to deliver desired behaviors from the bureaucracy. Cf. James H. Kuklinski and Paul J. Quirk, *Reconsidering the Rational Public: Cognition, Heuristics and Mass Opinion*, in *ELEMENTS OF REASON* 153 (Arthur Lupia, Mathew D. McCubbins and Samuel L. Popkin, eds. 2000)(suggesting that the difficulty of interpreting information given the heuristics used by individuals to make sense of the political world shapes opinion formation).

<sup>75</sup> See *id.*; Lehrer, *supra* note 68, at 4. See also *infra* Part III (reviewing the extent of opposition to reorganization among more senior legislators). For an insightful account of the extent of congressional opposition to a previous presidential reorganization effort that threatened the internal allocation of legislative jurisdiction, see Polenber, *supra* note \_\_\_. Divisions among legislators underscore the fact that, on an issue like the potential creation of a new Department of Homeland Security, legislators are likely to divide into several groups: (a) those who sit on committees that oversee bureaucracies that would be moved to the new DHS; these members had something to lose from the reorganization; (b) those members who sat the committees likely to gain oversight power over the new DHS; (c) all others, who might evaluate the details of legislative proposals on the basis of potentially desirable position-taking opportunities or specific provisions affecting their political goals. See *infra* Part II.

existing committees with jurisdiction over homeland security, to make final decisions on the House version.<sup>76</sup>

Hastert's move is understandable. If the leadership had left the decisionmaking solely to the existing standing committees with existing authority, they were likely to oppose the major reorganization that the President was now publicly committed to support and a growing chunk of the public appeared to support. Alternatively, if Hastert created his own handpicked committee, existing members and committees would likely be opposed to the result.

The markups revealed widespread concern among the committees regarding potential changes in their jurisdiction. For example, the House Judiciary Committee voted to transfer the Secret Service to the Justice Department (over which it had jurisdiction) instead of letting it go to the new cabinet agency. The House committee with jurisdiction over transportation issues sought (like the one in the Senate) to prevent or delay moving the new Transportation Security Agency to the new department. And many committees sought to limit the presidential powers in the new bill, such as those allowing the White House to appoint assistant secretaries without Senate confirmation.

Although the first stage of advisory markups appears symbolic since the Select Committee would have final say, the procedure resulting in these votes could also be understood serving a critical information collecting device for party leaders who favored the reorganization. The House leadership appeared inclined to support the President's push for reorganization. Nonetheless, the membership was likely to be quite wary of a wholesale redistribution of power within the legislature, which was an almost inevitable consequence of the reorganization legislation. The markups thus allowed the committees to reveal what portions of the proposed changes were politically most costly to them and which were less so. The Select Committee could then take these committee actions into account in its decisions, either by incorporating the committees' changes or by searching for other means to assuage the committees' ostensible concerns. The Select Committee reported its version of the HSA on July 19, 2002, on a straight 5-4 party-line vote. This legislation became the basis for the final bill, described below, and passed the full house on July 26, 2002.<sup>77</sup>

Partisan divisions on the House Select committee foreshadowed greater conflict in the Senate, where Democrats controlled the chamber by a tiny margin. Already, the President's June announcement had probably begun to blunt the perception, which Senator Lieberman had intensely sought to foster, that creating the new super-agency was a Democratic initiative. Lieberman now sought to recapture the initiative. In late July, the Senate Governmental Affairs Committee approved a Lieberman-sponsored version of the homeland security bill (S2452) with civil service provisions more acceptable to the Democrats and provisions transforming Ridge's existing office at the White House into an Office of Counterterrorism with a director subject to Senate Confirmation. The Senate

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<sup>76</sup> See *Bush Security Plan Seeks Boost in Power*, HOUSTON CHRON. A2 (July 16, 2002), avail. at 2002 WLNR 13619969; *No Quick Homeland Security Fix*, CHICAGO TRIB. 22 (July 17, 2002), avail. at 2002 WLNR 12640049.

<sup>77</sup> See CONG. QUART. ALMANAC 2001 AND 2002; Donald R. Wolfensberger, *Congress and Policymaking in an Age of Terrorism*, in CONGRESS RECONSIDERED (Lawrence C. Dodd and Bruce I. Oppenheimer, eds., 8<sup>th</sup> ed. 2005).

then received the House version of the HSA (HR5005), which allowed the President, among other things, the power to exempt parts of government from federal labor management relations statutes.<sup>78</sup> Lieberman and his allies sought to substitute his new bill for the House version. But Senator Phil Gramm filibustered cloture motions to limit debate.<sup>79</sup> In the end, Senate Democrats were unable to pass a cloture motion to force a vote on their preferred version of the bill, which would have triggered a House-Senate conference on the creation of the new department. And they were unwilling to compromise on the civil service provisions. Thus, when the midterm elections arrived, the Senate had not agreed to support the President's and the House Republican leadership's version of the HSA. Ironically, the Democrats were exposed to the charge that they opposed the creation of a Department that they had played such a key role in forcing the President to accept.<sup>80</sup>

The elections brought further unwelcome news for the Democrats, who lost the Senate and were dealt an even more lopsided minority in the House. After a final attempt to strip provisions allowing the President to suspend collective bargaining protections, the Democrats compromised and allowed cloture to be invoked in the Senate by a vote of 83 to 16 on November 19, 2002. The Senate then passed the House bill with minor amendments that were approved in the House by voice vote, and the bill was sent to the President on November 22, 2002.<sup>81</sup>

#### *E. The Final Bill*

When the President declared victory three days later, he signed a bill that was far more detailed than what the White House had proposed. The details reflected protracted presidential bargaining with Congress. On the surface, the final bill established a department that was quite similar to what President Bush had proposed. Consistent with the President's proposal, the core functions of the department were grouped into four directorates: Border and Transportation Security (including the bulk of the agency's employees and resources), Intelligence and Infrastructure Protection (incorporating some of the smaller infrastructure protection offices absorbed from Commerce and the FBI), Science and Technology (including the Homeland Security Advanced Research Projects Agency, or HSARPA, initially projected to administer a \$500 million fund supporting innovative research and development projects), and Preparedness (primarily FEMA) (Senate Govt. Affairs Committee, 2002).<sup>82</sup> As Table 1 indicates, not every agency that

<sup>78</sup> See CQ WEEKLY, 2028 (July 27, 2002).

<sup>79</sup> Republicans emphasized that presidential waiver authority to modify the operation of collective bargaining agreements already existed for other departments, and that if anything, a president should have expanded authority to impact the implementation of collective action agreements in the homeland security context. See CONG RECORD – HOUSE, H5804 (July 26, 2002).

<sup>80</sup> See Clarke, *supra* note 26, at 249-250.

<sup>81</sup> With respect to civil service provisions, law gave the president most of what he sought, including the power to abrogate, for a period of up to five years, many civil service protections for key DHS employees. HR 5005 ("Homeland Security Act," or "HSA"), Section 841(a)(2). The law allows the Secretary, in conjunction with the Director of OPM, to prescribe a "human resource management system" for the Department, waiving civil service provisions governing compensation, evaluation, reward, and punishment of employees.

<sup>82</sup> Despite the rich variety of functions suggested by the existence of these four directorates, nearly 90% of the new department's employees and 65% of its budget were in the Border and Transportation Security Directorate. *Protecting the Homeland: The President's Proposal for Reorganizing Our Homeland Defense*

the White House working group considered placing within the Department ended up in the new agency. The sprawling agency had nonetheless come to encompass functions ranging from international child labor investigations to marine fuel leaks, and included nearly every entity that the President ultimately proposed to move into the new agency.

**Table 1: Selected Agencies Considered for Transfer to DHS<sup>83</sup>**

<i>Bureau considered for transfer (in bold if not slated for transfer before White House deliberations began)</i>	<i>Responsibilities for “homeland security” (using Administration’s definition focused on terrorism and other explicit manmade threats)</i>	<i>Non-homeland security responsibilities</i>	<i>Transferred?</i>
<b>Animal Plant and Health Inspection Service (Agriculture)</b>	(Capable of providing personnel for the support of inspections at the border)	Regulate the movement of animals and plants into and out of the country (affecting individuals, small businesses, and large agribusiness interests)	YES (partial; portions left at Agriculture after legislative changes)
<b>U.S. Secret Service (Treasury)</b>	Protect top U.S. government officials, provide security at high-profile public events	Investigate financial fraud (“wire” and “access device” fraud), counterfeiting (borderline homeland security)	YES
U.S. Coast Guard (Transportation)	Patrol U.S. territorial waters, potential incident response capacity in emergencies, can be deployed as part of the Navy in wartime/emergencies; Drug interdiction (borderline non-homeland security)	Marine safety enforcement (regulating ships and companies owning ships) Setting rates for the use of marine facilities and waterways; Setting rules for the use of drawbridge and similar facilities; Marine environmental regulatory enforcement (oil and chemical spills, marine water pollution rules); Search and rescue (borderline homeland security)	YES
Immigration and Naturalization Service (separated into: Bureau of Citizenship and Immigration Services, an investigative bureau merged with portions of Customs, and a border enforcement and administration bureau merged with portions of Customs)(Justice)	Screen entrants at the border (including potential terrorists); enforce internal immigration laws (borderline non-homeland security)	Provide immigration services to the public (borderline homeland security)	YES
FEMA (independent)	Disaster relief and recovery services in response to terrorist attacks	Disaster relief and recovery services in response to natural disasters and major industrial accidents; Flood insurance; Nutrition assistance; natural disaster mitigation	YES
U.S. Customs Service (separated into: Bureau of Customs and Border Protection, encompassing portions of INS focused on border	Inspections at the border (screening for explosives, WMD) Narcotics interdiction	Tariff and trade-related tax enforcement; Write and enforce elaborate trade regulations, including	YES

*Infrastructure*, HEARINGS BEFORE SUBCOMMITTEE ON TECHNOLOGY, TERRORISM, AND GOVERNMENT INFORMATION, SENATE COMMITTEE ON THE JUDICIARY, 107<sup>th</sup> Cong, 2002, (Statement of Ivo Daalder).

<sup>83</sup> Sources: Brill, *supra* note 21 (describing the White House PEOC group’s deliberations); President’s Proposed Homeland Security Act (describing the agencies the President sought to move into the new department); HR 5005 (listing agencies actually included in the new agency); U.S. Government Manual (2002)(describing agency functions).

enforcement and administration; and enforcement bureau encompassing both Customs and INS criminal investigation functions)(Treasury)	(borderline non-homeland security)	those involving child or forced labor, environmental provisions, and strategic trade rules	
<b>Critical Infrastructure Assurance Office</b> (Commerce)	Promote private sector activities to protect critical infrastructure from terrorist attacks	Encourage private sector activity to protect critical infrastructure from natural disasters	YES
National Infrastructure Protection Center (Justice/FBI)	Investigate, analyze, and respond to manmade threats to critical infrastructure	Minimal	YES
Office of Domestic Preparedness (Justice)	Domestic preparedness grants (borderline non-homeland security)	Disaster response functions (including for non-terrorism related disasters)	YES
<b>Bureau of Alcohol, Tobacco, and Firearms</b> (Treasury)	Explosives enforcement (regulation and criminal investigation)	Collection of excise taxes on alcohol, tobacco, firearms, and explosives Extensive firearms regulation (including access, sales, and licensing)(borderline homeland security)	NO (moved to Justice Department; not included in President's reorganization plan)
<b>Federal Aviation Administration</b> (Transportation)	Aviation security	Regulating air traffic and aviation safety	NO (left at Transportation; left out of President's plan)
State Department Visa Processing Functions	Screen visa applications (including those requested by potential terrorists)	Screen visa applications (including those requested by everyone else)	NO (included in President's plan, but left at State after congressional changes)
Transportation Security Agency (Transportation)	Manage national airport screening system Non-aviation security responsibilities	Security responsibilities involving threats other than terrorism	YES
<b>Nuclear Regulatory Commission</b>	Reducing the vulnerability of nuclear powerplants to terrorist attacks, safeguarding of nuclear materials used for civilian applications in the United States	Regulation of nearly all aspects of the civilian nuclear industry, including licensing of new nuclear reactors and civilian nuclear technologies, health and safety regulation of the ongoing use of nuclear technologies	NO

Despite the White House's relative success, the legislative bargaining process also introduced some important changes. The final Homeland Security Act contained nearly two hundred separate legislative provisions (with some individual provisions stretching over a half-dozen pages). In contrast, the President's original proposal contained fewer than fifty sparsely-written provisions focusing primarily on the structure of the four aforementioned directorates. This disparity reflects complexities lurking beneath the surface of the HSA.

Unlike the original White House bill, for instance, the resulting HSA simultaneously included language explicitly emphasizing the importance of non-homeland security missions along with the terrorism-focused language (Section 101) and provisions establishing the Secretary's power over the bureaus (Section 102). It could not have been lost on legislators that the first *three* of the Department's six functions concerned terrorism. At the same time, lawmakers supplemented the blanket entreaty for the new Department to "ensure that the functions of the agencies and sub-divisions within the Department that are not related directly to securing the homeland are not diminished

or neglected except by a specific explicit Act of Congress” with more specific agency specific language. In the case of the Coast Guard, legislators actually allowed some (ostensibly limited) diminution of non-homeland security functions, but sought to monitor changes in its non-security regulatory and safety missions by requiring regular reports from the Inspector General and the Secretary (Section 888). The HSA also contained similarly-detailed provisions governing a plethora of other agencies transferred to the new department, specifying (for example) that some revenue-collection regulatory functions of Customs would remain at Treasury (Section 412) while the Secretary of Homeland Security could administer others,<sup>84</sup> and providing that FEMA should carry out an “all hazards” mission while simultaneously allowing the Secretary the flexibility to refocus FEMA’s actual operations (Section 507).

The resulting bill also denied to the White House many of the sweeping presidential powers contained in the original proposal. Despite the presence of united Republican government, the bill did not allow the White House to directly control the timing of agency transfers, to redistribute appropriations among different agencies, and to appoint assistant secretaries without Senate confirmation. The HSA also created a host of research institutes and centers of excellence with mandates to focus on exceedingly broad conceptions of homeland security (including, for example, one center focused on developing new prison-related technologies)(Sections 231-237; 312-313). Over time these institutions would almost certainly serve as conduits for federal spending benefiting particular regions or industries.<sup>85</sup>

Finally, the legislation accomplished a proliferation of other goals, many of which were initially addressed in separate legislative proposals. For instance, although the Justice Department lost virtually all its immigration enforcement power when INS was transferred into the new Department, it gained most of Treasury’s Bureau of Alcohol, Tobacco, and Firearms (Title XI). Pilots gained a right to be armed (Title XIV). Airlines obtained new insurance and financial protections (Title XII), and the Department gained

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<sup>84</sup> This provision is illustrative of the legislative compromises simultaneously including language emphasizing the importance of legacy mandates while actually conferring greater authority on executive officials. The revenue provision does not allow Treasury to retain exclusive control over the revenue-related regulatory functions of Customs. Under the HSA, the Secretary of the Treasury has the power to delegate these functions to the Secretary of Homeland Security, and – where such delegation has not occurred – must consult with the Secretary of Homeland Security on the performance of these functions (Section 412(a)(1)). Thus, even if the Secretary of the Treasury chose not to delegate any of these powers, the law allows Treasury to wield its tariff-related regulatory authority only in consultation with the Department of Homeland Security. The Secretary of Homeland Security, moreover, retains considerable discretion to set enforcement priorities at Customs despite language in Sections 413-417 placing limited restrictions on the Secretary’s ability to directly diminish or discontinue revenue-related functions. For example, while the Secretary may not directly “reduce the staffing level, or reduce the resources attributable to” functions performed by Customs’ dedicated revenue and trade staff, the Secretary appears to retain authority to affect the priorities of the more than 20,000 employees under the Office of Field Operations that administer ports of entry, thereby changing the amount of information produced about potential revenue and trade violations.

<sup>85</sup> See Homeland Security Act, *supra* note \_\_\_. The extent to which legislators across parties collaborated in restraining White House efforts to expand the scope of presidential power illustrates the potential willingness of legislators to prioritize institutional prerogatives (which can translate into policymaking power and electoral advantage) despite partisan differences. For a contrary perspective, playing down the possibility of cross-party institutional interests, see Daryl J. Levinson and Richard Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

new regulatory powers to protect manufacturers of “anti-terrorism” technologies from liability (Sections 861-865).<sup>86</sup>

Together these features evince the importance of four recurring themes associated with the legislative bargaining process. *First*, although the new bill granted the Secretary of Homeland Security sweeping powers of “direction, authority, and control” over the new Department (Section 102), legislators recoiled from granting the President the sweeping powers he had requested to reallocate appropriations, appoint assistant secretaries without confirmation, and control the timing of agency transfers. *Second*, legislators showed predictable interest in creating conduits for the transfer of federal money to particular regions or industries – in short, pork barrel. *Third*, lawmakers used the fast-moving HSA to advance discrete legislative projects that allowed them to signal desirable positions to the public (as with the provision arming pilots) or achieve major substantive policy goals sought by organized interests (such as the expansion in airline liability protections). *Fourth*, even as they ultimately voted for legislation that transferred major agencies into a new bureaucracy, legislators insisted on asserting control over those agencies by including provisions governing how those agencies were supposed to discharge their missions. In particular, legislators showed some awareness that the new department would – true to its name – emphasize homeland security over a plethora of legacy missions. In response, lawmakers made modest efforts to stress the continued importance of the agencies’ myriad non-homeland security responsibilities.<sup>87</sup>

Equally noteworthy is what the bill omitted – congressional organization. Section 1503 described the “sense of Congress that each House... should review its committee structure in light of the reorganization of responsibilities within the executive branch by the establishment of the Department,” but the bill required no changes in structure. Thus, as tens of thousands of inspectors, agents, and government employees began a long journey towards their positions in the new agency in late November 2002, the congressional oversight structure over the department’s components remained largely unchanged.<sup>88</sup>

Earlier the White House had sought to bolster its reorganization plan by arguing that too many congressional committees were involved in overseeing homeland security.<sup>89</sup> It now acquiesced to a status quo-driven congressional oversight structure. Although the Senate’s Homeland Security and Governmental Affairs Committee appears to have gained some degree of jurisdiction at the expense of other committees, the Senate’s Appropriations, Judiciary, Armed Services, and Finance Committees (among others) all retain substantial homeland security oversight responsibilities. In the House

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<sup>86</sup> *See id.*

<sup>87</sup> *See id.*

<sup>88</sup> *See Kettl, Systems Under Stress, supra* note 9 at \_\_\_. *See also Quelling Qualms on Security*, DALLAS MORNING NEWS 12A (Jan. 9, 2005), avail. at 2005 WLNR 24731284 (discussing House committees’ reluctance to yield turf to the newly permanent Homeland Security Committee); *Balancing Civil Liberties and National Security Needs*, TESTIMONY OF MARY A. FETCHET, FOUNDING DIRECTOR, VOICES OF SEPTEMBER 11<sup>TH</sup>, BEFORE THE HOUSE GOVERNMENT REFORM (June 7, 2006), avail. at 2006 WLNR 9751148 (“In the current structure, most congressional committees have some jurisdiction over homeland security, making the current system prone to turf battles and inertia... everyone is in charge so no one is in charge”)

<sup>89</sup> *See President’s Plan, supra* note 67.

even less centralization occurred in the legislative oversight structure. The relative preservation of the status quo in the House probably indicated the leadership's reaction to the repeated standing committee "advisory" markups seeking to limit the size and scope of the new department. Although such votes had not succeeded in limiting the scope of the sprawling new department, little had changed with respect to congressional oversight as late as mid-2004:

In reality, jurisdiction [over DHS] in both chambers remains allocated to dozens of committees and subcommittees. From January to June 2004, DHS officials testified before 126 hearings, or about 1 ½ per day of legislative session, not including briefings or other meetings. Secretary Ridge estimated that he has been called to appear before 80 different committees and subcommittees on the Hill.<sup>90</sup>

Potential problems with congressional oversight did little to dampen the political enthusiasm for the new Department when it finally opened its doors in mid-2003. The President had switched from opposing the merger to fashioning – with legislative allies – a new homeland security agency larger than anything previously proposed. Neither the Administration nor members of Congress involved in forging the department expressed much uncertainty about well this sprawling arrangement would function. But history would soon extinguish any certainty about the legislation's merits.

## **Part II. UPDATING POLITICAL THEORIES OF BUREAUCRATIC ORGANIZATION AND PERFORMANCE: THE POLITICAL-BUREAUCRATIC SYSTEM**

To understand the creation of DHS, we must begin by considering what politicians want to accomplish when they bargain over the creation of a new bureaucracy. Over the past three decades, political scientists have developed a new approach to studying questions of bureaucratic performance and organization.<sup>91</sup> This perspective emphasizes a series of non-obvious implications about bureaucratic structure, incentives, and performance. In contrast to the traditional literature on bureaucracy,<sup>92</sup> which primarily seeks to explain

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<sup>90</sup> Thomas M. Susman, *Congressional Oversight of Homeland Security*, 30-FALL ADMIN. & REG. NEWS 2 (2004).

<sup>91</sup> See, for example, John A. Ferejohn and Charles R. Shipan, *Congressional Influence on Administrative Agencies: A Case Study of Telecommunications Policy*, in CONGRESS RECONSIDERED (Lawrence C. Dodd and Bruce I. Oppenheimer, eds., 1989); MORRIS FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT (1981); Mathew D. McCubbins and Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POLI. SCI. 165 (1984); McNollgast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989); Terry M. Moe, *The Politics of Bureaucratic Structure*, in CAN THE GOVERNMENT GOVERN? (John E. Chubb and Paul E. Peterson, eds., 1989); John Ferejohn and Charles Shipan, *Congressional Influence on the Bureaucracy*, 6 J. LAW, ECON. & ORG. S1 (1990); Terry M. Moe, *An Assessment of the Positive Theory of 'Congressional Dominance'*, 12 LEG. STUD. Q. 475 (1987); and Barry R. Weingast and Mark J. Moran, *Bureaucratic Discretion or Congressional Control: Regulatory Policymaking by the FTC*, 91 J. POL. ECON. 765 (1983). Recent surveys of this now vast literature include JOHN HUBER AND CHARLES SHIPAN, DELIBERATE DISCRETION? THE INSTITUTIONAL FOUNDATIONS OF BUREAUCRATIC AUTONOMY (2002) and Weingast, *supra* note 13. DAVID EPSTEIN AND SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS (1999).

<sup>92</sup> See, e.g., ALVIN GOULDNER, PATTERNS OF INDUSTRIAL BUREAUCRACY (1954); Herbert Kaufman, *The Direction of Organizational Evolution*, 33 PUB. ADMIN. REV. 300 (1973); JAMES G. MARCH AND HERBERT



bureaucratic inefficiency from what could be called an “internalist” perspective focusing largely on the goals and routines of the bureaucracy itself, the new approach discussed here places greater emphasis on explaining inefficiency from an “externalist” perspective – one based on factors in a bureaucracy’s political environment, especially the various legislation it faces.<sup>93</sup>

This Part uses the preceding insights about the importance of external political dynamics to develop a theory explaining the creation and performance of bureaucracies such as DHS. Our approach refines existing theories by better accounting for the impacts of crises and uncertainty about the prescriptive effects of reorganization. These refinements allow us to better understand the political design of legal mandates in other contexts arising throughout history.

The basic outline of our theory can be summarized briefly. First, interest groups have influence on the process because they affect the reelection prospects of political officials.<sup>94</sup> Interest group activity implies a bias toward those groups who are active. But this influence is not simply general influence. It works through the political system. Interest groups in the President’s support constituency have more influence than those who are not. Similarly, those interests closely connected with important members on the relevant congressional subcommittees that oversee various agencies have more influence. Second, a range of inter-branch dynamics shape the legislative process. As lawmakers bargain, key legislators negotiate with organized interest groups and with the president. The resulting congressional process – combining internal negotiations among legislators, pressure from outside interest groups, and bargaining with the president – puts its distinctive stamp on both bureaucratic structure and bureaucratic incentives. Third, a range of intra-branch politics affects design, involving both bureaucratic politics within the executive branch as well as congressional bargaining among committees and among legislators with different vested interests in the existing structure. Fourth, mass politics affects design. Differences in how attentive and informed is the public affect the induced preferences of representatives over various institutional design questions. Fifth, a crisis dramatically transforms public attentiveness and can therefore dramatically change the political pressures on a given issue. Together these factors interact in potentially complex ways.

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A. SIMON, *ORGANIZATIONS* (1993); PHILIP SELZNICK, *TVA AND GRASSROOTS: A STUDY IN THE SOCIOLOGY OF FORMAL ORGANIZATIONS* (1966); and HERBERT SIMON, *ADMINISTRATIVE BEHAVIOR* (4<sup>TH</sup> ED. 1997).

<sup>93</sup> The “internalist” literature is not without value. For instance, March and Simon’s account of bounded rationality within organizations almost certainly explains why, even in the absence of external constraints, bureaucratic actors create routines that distort organizations’ ability to respond to their environment. Indeed, the strategic political action characteristically associated with the external perspective may interact with the internalist dynamics, as when politicians deliberately place an organizational sub-unit within a larger agency whose mission may shape the sub-units priorities in politically desirable ways (hence, for example, the placement of the Office of Foreign Assets Control, or OFAC, in the Treasury Department, an environment likely to make OFAC more sensitive to private sector concerns than had the agency been placed within the Justice or State Departments). Cf. Wilson, *Bureaucracy*, *supra* note 7. Nonetheless, as we note above, there is reason to question the extent to which a purely internalist focus can give a compelling account of public organizations and the hurdles they face, in general, and of the evolution of major federal reorganizations such as those affecting homeland security, in particular. By definition, legislative decisions about structure involve a host of external political actors with competing agendas.

<sup>94</sup> See Moe, *Politics of Bureaucratic Structure* *supra* note 92, at 289.

### A. *A Theory of Legislation: Inconsistent Objectives*

The civics textbook view of national legislation is that it is designed to solve various social, economic, and security problems.<sup>95</sup> In practice, legislation rarely addresses these problems particularly well when measured against the standard of what politicians publicly claim their goals to be. The reason is politics. First, as designed by the founders, the separation of powers system assures that the two houses of Congress and the president have different electoral constituencies and therefore respond to different interests. The different constituencies lead officials in the different branches to favor different ways to address each policy issue. Second, legislation requires majority support, granting majority (and sometimes filibuster or veto-override) pivots bargaining power. Third, each house of Congress has a range of institutions whose effect are to grant further bargaining leverage and veto gates over legislation, notably, committees and the majority party leadership.

All these institutional features of national politics combine to grant bargaining power to a range of legislators with divergent goals. Routinely, these legislators use their leverage to alter the legislation in ways that benefit their constituents who may have very narrow interests or interests that conflict with the overall goals of the legislation. Below we will survey a series of implications that congressional institutions have for the shape of legislation. For now, we mention one that we believe is the most important, namely, the effects of political compromise on the shape of legislation.

Typically, legislation begins with proponents who favor legislation that addresses a particular problem.<sup>96</sup> Often, the initial legislation is designed efficiently in the sense that, given the sponsors' definition of the problem, the legislative proposal addresses the problem directly. This proposal is often relatively short. More importantly, the proposal typically has little chance of passing in this form. In opposition to the legislation's sponsors are the opponents who see to preserve the status quo by defeating the legislation in any form.

Although most popular accounts depict legislative struggles between the legislation's proponents and opponents, a critical – indeed, pivotal – third group exists; namely, the moderates. As the moderate go – for or against – so goes the legislation. To succeed, a bill's sponsors must bargain with the moderates for their support. The inherent need to negotiate to pass legislation implies that nearly all successful congressional legislation is the product of legislative compromise between the bill's sponsors and the moderates. Moderates generally seek to pass a weaker form of the legislation, a bill that simply does less of what the sponsors originally proposed. Typically, compromise the brings the moderates on board requires limits on the legislation, including restrictions, exceptions, and cumbersome procedures that afford interested parties the ability to

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<sup>95</sup> See, e.g., KENNETH PREWITT, AN INTRODUCTION TO AMERICAN GOVERNMENT (1977). Traces of this perspective can also be found in legal scholarship emphasizing the virtues of representative political institutions. Cf. JOHN HART ELY, DEMOCRACY AND DISTRUST (emphasizing the extent to which the resolution of political problems through representative political institutions is preferable to the alternatives).

<sup>96</sup> This perspective draws on McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3 (1994) and Daniel B. Rodriguez and Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1412 (2003).

contest or delay the implementation of the legislation's effects. These provisions often compromise the legislation's purpose in the sense that they make it harder.<sup>97</sup>

An example: In the mid-1970s, environmentalists sought to control sulfur-dioxide emissions, a major source of which was sulfur in coal burned to generate electricity. To reduce these emissions, utilities could either switch to low-sulfur coal or add "scrubbers" to their waste stacks that would eliminate the sulfur from the exhaust emissions. Although the prescriptively optimal way to address the problem would have been to allow some utilities to burn low sulphur coal instead of installing scrubbers, this approach engendered political opposition because it endangered union jobs in the high sulfur coal regions. In the end, supporters of the legislation agreed to compromise with the representatives of the unionized coal regions to require that every utility in the country – regardless of whether they burned high or low sulfur coal – add scrubbers. This requirement at once raised the cost of removing sulfur from emissions, lowered the overall environmental cleanup per dollar spent, but saved union jobs.<sup>98</sup>

In short, major legislation often approaches incoherence, in the sense that it contains provisions designed to address a particular problem along with provisions that limit the efficacy of those solutions in the form of exceptions, exemptions, limitations, and cumbersome procedures.<sup>99</sup> The latter provisions meant to qualify the act are a necessary feature of the legislation: without them, the legislation would not pass. Put differently, members of Congress knowingly pass an incoherent measure, in the sense that its provisions are internally inconsistent to the point of profound ambiguity, when they would not be able to pass the more coherent version.

#### *B. The Political-Bureaucratic System: Institutional Solutions to Delegation Problems.*

##### *i. The Imprint of Legislative and Executive Politics on the Delegation of Statutory Authority to Bureaucracies*

The divisions among legislators – and between specific legislators and executive branch officials – discussed above have predictable implications for the production of statutes and the structure of the bureaucracies that implement statutes. In particular, previous research identifies the following factors as especially likely to shape legislative bargaining when lawmakers are divided about their goals. The general consequence of this system is goal distortion, or the process by which politics inevitably distort the goals of the legislation as legislators transform a proposal into a vehicle that will pass Congress.

**(1) The distributive tendency and goal distortion.** An inevitable effect of the legislative process is that benefits from a program must be widespread or the program will not gain sufficient support to pass. Consider legislation designed to alleviate poverty. If the proposal does this efficiently, it will concentrate resources in states and congressional districts with high concentrations of poor people. Because poor people are

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<sup>97</sup> See *id.*

<sup>98</sup> See BRUCE A. ACKERMAN AND WILLIAM T. HASSLER, CLEAN COAL / DIRTY AIR, OR HOW THE CLEAN AIR ACT BECAME A MULTIBILLION-DOLLAR BAIL-OUT FOR HIGH-SULFUR COAL PRODUCERS AND WHAT SHOULD BE DONE ABOUT IT (1981).

<sup>99</sup> See McNollgast, *Structure and Process*, *supra* note 92, at \_\_\_; Rodriguez and Weingast, *supra* note 96, at \_\_\_.

a relatively small minority of the country – perhaps fifteen percent – the legislation concentrates resources in a small number of congressional districts. This concentration also means that the legislation will have difficulty passing. A small minority of districts gain by the legislation, while most legislation gain little while bearing the tax costs of the program.

In reaction to the problem of passage, bill sponsors have a tendency to distribute the funds more widely than efficiency dictates. This *distributive tendency* implies a high likelihood of goal distortion.<sup>100</sup> By distributing the funds from a program more widely, this tendency breaks the link between the legislative solution and the problem the program is designed to address. Programs regularly distribute funds widely in a way that distorts their purpose. Some examples include the space program, various urban and housing programs, the Department of Energy's National Laboratory system, and (as discussed below) DHS' programs to fund emergency preparedness grants as well as research and development.<sup>101</sup>

**(2) Multiple veto points.** We have already seen that the need to command a majority typically implies legislative compromise that affects both the legislation's goals and the means by which it addresses those goals. Other aspects work in the same way.

First, at least two committees (one in the House, and one in the Senate) share jurisdiction on any given issue, and often many more committees have somewhat overlapping jurisdiction. Because of these multiple veto points, members can sometimes hold up legislation desired by others as bargaining leverage over legislative issues wholly independent of the legislation. During the consideration of the early legislation addressing the savings and loan crisis of the 1980s, both house and senate passed versions of legislation aimed at mitigating the growing problem that would ultimately cost taxpayers several hundred billion dollars. Both versions of the bill contained similar provisions addressing the crisis. But a compromise failed because House committee members had added different add-ons to the legislation than had the Senate committee members. Because the two committees could not agree on how to compromise these additional parts, the legislation died in 1986, allowing the problem to mushroom.<sup>102</sup>

Second, another type of intra-chamber conflict concerns the distribution of power and authority within the chamber. Committee members typically seek to enhance the discretion, scope, and authority of their committees, even at the expense of others.<sup>103</sup> For example, when a new issue arises that does not readily fit with the existing pattern of authority, members on different committees jockey for control of this issue. Energy provides the canonical example. Prior to the energy crisis of 1973, energy was a relatively minor issue. With the energy crisis, it suddenly became a national issue. Within each chamber, a wide range of committees sought to control a piece of this issue. Indeed,

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<sup>100</sup> See Kenneth A. Shepsle and Barry R. Weingast, *Political Solutions to Market Problems*, 78 AM. POL. SCI. REV. 417 (1984).

<sup>101</sup> See, e.g., MARY A. HOLMAN, *THE POLITICAL ECONOMY OF THE SPACE PROGRAM* (1974); Harold Orlans, 'D & R' *Allocations in the United States*, 3 SCIENCE STUD. 119 (1973); Patrick S. Roberts, *Shifting Priorities: Congressional Incentives and the Homeland Security Granting Process*, 22 REV. POLICY RES. (2005).

<sup>102</sup> See Romer and Weingast, *supra* note 16, at \_\_\_\_.

<sup>103</sup> DAVID C. KING, *TURF WARS: HOW CONGRESSIONAL COMMITTEES CLAIM JURISDICTION*. (1997).

negotiations over how to divide this authority within each chamber delayed a national response to the crisis for several years, from 1973 until 1977.

The upshot is simple. As new policy issues emerge and as political support for existing issues changes, committees negotiate over who has authority on a given issue or a given aspect of an issue. Because the policy preferences on the different committee jockeying for power can often be quite different, different allocations of authority within the chamber have significant policy implications.

**(3) Congressional jurisdictions.** Congressional committees and subcommittees are intimately involved in bureaucratic oversight.<sup>104</sup> These bodies are not only each chamber's agents charged with overseeing a bureaucracy's implementation of policy, but they put their own stamp of interest on the direction of that policy.

To an important degree, the structure of Congress parallels the structure of the bureaucracy, and vice versa. They work together. Moreover, complex policies, such as the environment and energy, are often divided into a great many pieces, with different subcommittees overseeing different portions of a bureaucracy's activities.<sup>105</sup>

Because members on the different subcommittees have different interests, they pull policymaking within their domain in different directions. For policies that are completely independent, this is fine, but when the policies interact – as they must, for example, because of budgetary tradeoffs – the inconsistent views on different subcommittees can create potential problems.

These interactions plainly have implications for bureaucratic reorganization. Consider a set of bureaus that work on related policies but were created by different legislation and are overseen by different subcommittees or committees. They are likely to pursue different types of goals, in part because the legislative creating them differs and in part because the interests of the members of the relevant subcommittees differ.

Suppose that the president seeks to achieve efficiency gains by coordinating the bureaus activities through a bureaucratic reorganization that combines the two. The degree to which these efficiency gains are realized in practice depends in part on whether there is a parallel congressional reorganization. Allowing the two separate subcommittees to retain jurisdiction over the different pieces of the now reorganized bureau impedes coordination: the different interests on the two subcommittees lead them to continue to pull the two portions of the reorganized bureau in different directions. Members of each subcommittee face a common pool problem: both prefer the efficiency gains, yet both prefer more benefits from their own portion of the whole. Because they control only their portion, each has a tendency to take more for itself. To the extent that coordination achieves an increase in benefits that comes at the extent of one of these pieces, members of the relevant subcommittee will use their oversight powers to work against

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<sup>104</sup> Indeed, some observers have called the relationship among congressional subcommittees, agencies, and interest groups “cozy little triangles” and “iron triangles.” See Fiorina, *supra* note 92, at \_\_\_\_.

<sup>105</sup> See Richard J. Lazarus, *The Neglected Question of Congressional Oversight of EPA: “Quis Custodiet Ipsos Custodes” (Who Shall Watch the Watchers)?* 54 LAW & CONTEMP. PROBS. 204 (1991). For an account of the interrelationship between bureaucratic actors, interest groups, and their overseers relying on the colorful “iron triangle” metaphor, see Thomas L. Gais, Mark A. Peterson, and Jack L. Walker, *Interest Groups, Iron Triangles, and Representative Institutions*, 14 BRIT. J. POLI. SCI. 161 (1984).

coordination. In contrast, if the congressional jurisdictions are also reorganized so that one subcommittee now gains sole jurisdiction over the bureau, it will better be able to make coherent tradeoffs between the two activities and hence to realize the efficiency gains.

**(4) Partisan electoral goals.** A fourth principle relevant for bureaucratic structure is that the two national parties have incentives to use legislation to enhance their members' electoral goals at the expense of the other. Parties with majorities in Congress typically have the advantage.

A particular instance of partisan warfare is "baiting" the opposition on popular legislation. Suppose the public is strongly supportive of some legislation. Because voters rarely follow or understand legislative details, the majority party has an incentive to add extreme components to popular legislation in an effort to bait the minority. They do so in hope that members of the opposition will object to or obstruct the legislation because of these features. Often, the public fails to understand the nuances and instead sees the opposition as simply objecting to the legislation. This gives an electoral issue to majority party candidates who challenge opposition incumbents. Sure, the incumbent will try and explain – "I would have supported the legislation, but this one feature made it objectionable." Sometimes that works, but sometimes it simply sounds like an excuse, one that fails to convince voters.

## *ii. Two Theoretical Refinements.*

Despite its usefulness in understanding the broad outlines of how statutes and bureaucracies are designed by the legislature, existing work largely leaves out some crucial elements; notably, the role of crises and uncertainty. Consider each in turn.

**(1) The Role of Crises.** For our purposes a crisis is (a) an exogenous shock sharply raising demand for policy changes in a particular domain that (b) is costly for politicians to ignore.

A political crisis has four interrelated effects on the forces underlying bureaucratic creation and structure. First, it implies a far more attentive public. Although the public cannot attend to the policy details, an attentive public pressures political officials to address the problem underlying the crisis.<sup>106</sup> Second, as a consequence of public attentiveness, interest groups often have less power to protect their interests. Whereas interest groups may predominate in the relevant policy areas prior to a crisis – in part because of relatively inattentive public or because the portion of the public that is attentive is a small subset of the larger population – a crisis that brings public attention provides a new set of rewards for public officials to counterbalance the rewards generated by interest groups. In some cases this change allows new interest groups to become relevant, as in contractors following a widely publicized natural disaster.<sup>107</sup> Third, a crisis typically means a far greater urgency than in most policy areas

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<sup>106</sup> See Jon A. Krosnick, *Government Policy and Citizen Passion: A Study of Issue Publics in Contemporary America*, 12 POL. BEHAVIOR 59 (1990); Jon A. Krosnick and Shibley Telhami, *Public Attitudes Toward Israel: A Study of the Attentive and Issue Publics*, 39 *Int'l Stud. Q.* 535 (1995); Mark Peffley and Jon Hurwitz, *International Events and Foreign Policy Beliefs: Public Response to Changing Soviet-U.S. Relations*, 36 AM. J. POL. SCI. 431 (1992).

<sup>107</sup> This shift in the policy environment is not necessarily a shift in the inherent concerns of legislators and other politicians, but in their incentives. Even with a constant distribution of concerns among policymakers

so that political officials must act fast; failing to do so will leave political officials electorally vulnerable for having failed to address such a critical issue in a timely fashion. Finally, these effects are sometimes most pronounced for the president in the sense that he is seen as the national leader.<sup>108</sup>

Taken together, these four effects have several implications for a crisis response. First, this response is sometimes (and perhaps often) ill-considered. Because an attentive public demands timely action but cannot understand details or the implications of all bureaucratic-institutional choices, elected officials are tempted to act too quickly so that they can demonstrate their responsiveness, even if their legislation is ill-considered.

As an example, consider the response to the thalidomide episode about drug safety. Thalidomide was a drug given to pregnant women in the 1950s and early 60s to reduce the effects of morning sickness, but had disastrous side effects induced by impairing fetal development. Many so-called thalidomide babies were born without arms or legs.<sup>109</sup>

Prior to the thalidomide episode, Senator Estes Kefauver (D-TN) was highly critical of the drug regulatory process by the Food and Drug Administration (FDA), which had regulatory control over the introduction and oversight of drugs. For several years, he had held hearings and pushed legislation that would force drug manufacturers to prove their drugs were efficacious, namely, that they actually produced the effects that the manufacturers claimed. Of course, the problem of efficacy is largely independent of the problem of drug safety, which involves side effects.<sup>110</sup> In the wake of the thalidomide episode, the Congress quickly passed Kefauver's proposals even the episode involved drug safety while the legislation largely addressed the problem of efficacy.

This case exhibits two separate ironies. First, the 1962 Drug Amendments have been shown to have massive negative effects on the introduction of new drugs in the United States relative to Europe, Canada, and Japan. Second, under the existing regulatory scheme thalidomide had never been introduced in the United States (the side effects occurred from its distribution in Europe and Canada).<sup>111</sup>

Thus, the policy imperative created by a crisis combines with a public inattentive to policy details to push political officials to act quickly, sometimes more quickly than is advisable. For many officials, it is better to have some policy – any policy – than delay that eventually yields a policy better aimed at the problem.

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(e.g., reelection, policy goals, and professional or political advancement), a substantial change in the public's goals and expectations can alter the extent to which politicians can achieve their mix of goals without explicitly satisfying public demands.

<sup>108</sup> See Lewis, *supra* note 7, at \_\_; Zegart, *Flawed By Design*, *supra* note 6, at \_\_ (discussing differences in the President's incentives because he responds to a national constituency).

<sup>109</sup> See Samuel J. Rascoff and Richard L. Revesz, *The Biases of Risk Tradeoff Analysis: Towards Parity in Environmental and Health-and-Safety Regulation*, 69 U. CHI. L. REV. 1763 (2002).

<sup>110</sup> See Daniel Carpenter, *The Gatekeeper: Organizational Reputation and Pharmaceutical Regulation at the FDA*, unpublished manuscript on file with author (2006)(providing a detailed qualitative account of the development of the FDA, noting that even an account emphasizing the role of bureaucratic autonomy acknowledged the impact of the Thalidomide scare on the FDA's political environment).

<sup>111</sup> See Paul J. Quirk, *The Food and Drug Administration*, in *THE POLITICS OF REGULATION* 191 (James Q. Wilson, ed. 1980)

Second, another effect of crises concerns interest groups. In contrast to the pattern governing legislation and policymaking in ordinary times, crises can make it attractive for politicians to act despite the opposition of interest groups. The policy equilibrium in ordinary times generally reflects the influence of (sometimes competing) interest groups. Crises that draw public attention provide a new source of political rewards to political officials. Public attention thus allows legislators and the president more room to bargain over policy changes given the extent of public demand.

Nonetheless, it is wrong to assume that this window for policy innovation is more likely to lead to prescriptively attractive policies. With interest groups less able to stop or water down a legislative change, the president and the legislature take center stage. Presidents may seek new legislative authority to layer political appointees over existing independent agencies, while enterprising legislators lacking the most desirable committee assignments may scheme to enhance their own committees' jurisdiction. But, as will emerge below, their competing objectives are likely to lead them to create bureaucracies ill-equipped to achieve stated purposes, except under special conditions. In contrast, politicians might work hard to build an effective bureaucracy after a crisis if the relevant goals are widely supported, if accurate information is widely available about the relationship between structural or legal changes and the advancement of those goals, and if bureaucratic performance to achieve those goals is easily observable over time. If these conditions existed, a crisis could free politicians from some of the interest group pressures that often contribute to bureaucratic failure. In contrast, in the absence of the aforementioned conditions, crises have the potential to introduce distinctive pathologies into the legislative process as legislators and the president scramble to produce changes simultaneously advancing their political agendas and pleasing a more attentive public.

**(2) The Role of Uncertainty.** The relationship between bureaucratic institutions and performance is not an exact science. This implies a significant degree of uncertainty about policy effects associated with any reorganization. More extensive reorganizations entail an even greater degree of uncertainty about long-term prescriptive consequences.

Consider a reorganization designed to create greater coordination among related agencies. Putting the agencies together under a single umbrella with greater centralization holds the potential for greater coordination. But it also has a range of potentially negative effects. *First*, by creating a far larger and more complex organization, massive centralization makes it harder for organizational leaders to master their organization, to understand its separate parts and to understand the complex ways in which better coordination can be achieved. Even if a new agency were sharply focused on a narrow definition of homeland security, the full scope of activities involving matters such as immigration enforcement would require officials to understand sprawling intricacies.<sup>112</sup> *Second*, centralization can diminish the competition among agencies and risks creating a

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<sup>112</sup> An example: Although “the core mission of [DHS] is widely viewed by the American people as combating terrorism... overwhelmingly, the DHS is involved in the prosecution of traditional kinds of immigration cases.” Only seven out of the 37,765 prosecutions filed arising out of DHS immigration investigations in FY 2004 were classified as involving international terrorism even under the Justice Department’s flexible standards for defining that category of prosecutions. In FY 2003, only one out of 20,771 prosecutions was classified as involving “international terrorism.” See Transactional Records Access Clearinghouse, *New Findings: Immigration Enforcement*, TRAC/DHS REPORT (August 19, 2005), avail. at <http://trac.syr.edu/tracins/latest/current/>.



bureaucracy with a monopoly of control over a massive portion of the government's operation.<sup>113</sup> Many areas of government feature competition because of the presence of multiple, semi-independent bureaucratic units, including the three branches of the military, the various agencies dealing with agriculture, and the many agencies focused on urban problems. The absence of competition tends to imply less efficient performance. *Third*, reorganization creates considerable uncertainty for individual bureaucrats by changing career patterns and promotion possibilities. Bureaucrats who lose power, authority, and promotion possibilities are far less likely to work toward the new goals sought by the reorganization. Rivalries within a single organization can often be counterproductive when one group seeks to promote itself over another. *Fourth*, some scholars suggest that increasing the presence of levels of hierarchy slows down bureaucratic responses to legislative signals designed to control the agency's work through the budget process. Politicians trying to insulate policy from legislative control can therefore use layers of hierarchy to frustrate lawmakers' control of agency actions.<sup>114</sup> *Fifth*, on a pragmatic level, reorganization and centralization may well decrease efficiency in the short run, as the transactions costs of combining computer systems and designing compatible operating procedures across formerly separate agencies takes considerable time and effort and in the short run may considerably impair performance.

Taken together, these factors suggest that centralization is likely to have two separate effects heightening the difficulty of achieving prescriptive benefits from reorganization. On the positive side, it holds the promise for greater coordination of effort, potentially allowing the efforts of many previously separate agencies to add up to a whole that is greater than the sum of its parts. On the negative side, centralization creates two different categories of problems. Uncertainty about its effects is a basic fact of organizational politics; and greater ability to coordinate in a centralized organization at the same time creates monopolization that reduces incentives for bureaucracies to efficiently carry out their supposed purposes. These two opposing effects imply that the prescriptive question of how to structure bureaucracies to accomplish particular goals is a complex one, made all the more so because the full constellation of relevant interests rarely agree completely on what those goals should be. Reorganization could be complicated from a policy perspective, and they could have counter-intuitive effects.<sup>115</sup>

This is not to say that uncertainty associated with reorganization creates a complete veil of ignorance about the consequences of forging a massive new Department. While key audiences trying to assess the long-term security payoffs of creating the Department would have faced considerable uncertainty, we do not believe that the probability of gains and losses is necessarily symmetrical. Moreover, the evidence implies that reorganizations as complex and massive as the one from which DHS was

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<sup>113</sup> See Lewis, *supra* note 7, at 7 (“[S]ome amount of redundancy and duplication can be desirable... in order to take ‘auxiliary precautions’ in case some important bureaucratic process breaks down or to induce competition among agencies that will improve performance among all.”); RICHARD A. POSNER, *UNCERTAIN SHIELD: THE U.S. INTELLIGENCE SYSTEM IN THE THROES OF REFORM* (2006). Regarding the consequences of diminished competition on efficiency, traditionally-defined, see, e.g., THRAINN EGGERTSSON, *ECONOMIC BEHAVIOR AND INSTITUTIONS* (1990).

<sup>114</sup> See Daniel Carpenter, *Adaptive Signal Processing, Hierarchy, and Budgetary Control in Federal Regulation*, 90 AM. POL. SCI. REV. 283 (1996).

<sup>115</sup> See Balogh et al., *supra* note 55, at \_\_; Wilson, *Bureaucracy*, *supra* note 7, at \_\_;

forged would be beset by transition costs.<sup>116</sup> Finally, presidents and their staff members may be able to predict certain implications of reorganization, such as those impacting the performance of domestic regulatory mandates.<sup>117</sup> By pressing agencies to do more with similar or more constrained resource endowments, reorganizations can subtly force agencies to reshape their activities. The relevance of uncertainty is in how difficult it made the process of precisely fixing the full extent of the costs and benefits associated with creating the Department. Were those costs and benefits easier to observe, the political game affecting presidential and statutory choices would play out differently.<sup>118</sup>

*D. Theoretical Conclusion: Policies Are Not Designed to Succeed*

In combination, these principles imply that legislative allocations of bureaucratic authority over legal mandates are often, perhaps even typically, not designed to succeed at achieving their stated goals. The need to pass legislation through a complex legislative process with many potential veto gates implies that a wide range of interests can hold up the legislation. Their price for allowing the legislation to move forward is that the legislation's proponents alter the legislation in a way that advantages those holding veto power. In combination, these imply a wide range of factors that distort the goals of the legislation. Legislation rarely addresses policy problems directly. Indeed, sometimes they are designed to fail. Moe's conclusions about the design of the Occupational Safety and Health Administration (OSHA) during the early 1970s are instructive, and likely generalize to a host of agencies and legal mandates:

While [the creation of OSHA] had the appearance of a systematic attack on the problem, in fact it was an administrative nightmare that did a thorough job of protecting business's interests. Authority was divided among an independent board, the secretary of labor, the states, HEW [the Department of Health, Education, and Welfare], and the courts. This would create confusion, lack of coordination, and multiple veto points. No one was in charge, and the secretary of labor, in particular, was kept weak.<sup>119</sup>

As with the case of OSHA, the political dynamics discussed here show how the writing of legislation designed to pass creates pressures that often break the link between the goals of legislation and what the legislation actually does. The distributive tendency reflects congressional legislation tendency to benefit a wide variety of districts rather than concentrate resources where the problem lies. Multiple veto points allow a wide variety

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<sup>116</sup> See *supra* Part I.c (discussing how the President's staff was concerned about transition costs; legislators acknowledged it; consistent with theoretical picture).

<sup>117</sup> See *infra* Part III.

<sup>118</sup> Note that uncertainty may also interact with voters' limited ability to understand the complexities of reorganization – hence, even if uncertainty was relatively low in an absolute sense, politicians who could advance their agenda by supporting the department's creation could take advantage of the ambiguities in voters' perceptions. And voters' attention could drop off sharply, allowing politicians to reap greater control over the implementation of a law such as the HSA. Cf. JAMES T. HAMILTON, REGULATION THROUGH REVELATION: THE ORIGIN AND IMPACTS OF THE TOXICS RELEASE INVENTORY PROGRAM (discussing the drop in voter attention after passage of legislation, and voters' difficulties in understanding the complexities of the legislative process).

<sup>119</sup> See Moe, *Politics of Bureaucratic Structure*, *supra* note \_\_, at 289-90. See also Cornell, Noll, and Weingast, *Safety Regulation*, in SETTING NATIONAL PRIORITIES: THE NEXT TEN YEARS (Owen and Schultze, eds., 1976).

of legislators to hold legislation hostage in an effort to gain favorable adjustments. Indeed, the general need for legislative compromise means that almost all legislation is incoherent: the different legislative components often work at cross purposes whereby one section promotes a particular goal and another qualifies and limits the ability of an agency to attain that goal. All this can be exacerbated by a mismatch between congressional committee jurisdiction and the organization of a bureaucracy. Put simply, the greater the dispersal of jurisdiction, the less coherent will be bureaucratic policymaking. Finally, partisan electoral goals often affect legislation.

By placing the focus beyond position-taking and emphasizing the role of crises and the intricacies that impact the real-world effects of reorganization, our theoretical approach builds on existing theories of how legislators allocate bureaucratic jurisdiction over legal mandates. We posit not only that reorganizations are driven by politics, but that they can be used to further presidential control and policy objectives in specific ways – such as by reshaping the regulatory missions of bureaus, or redistributing authority from career officials and bureau heads to political appointees. Our challenge is not just to the questionable assumption that reorganizations tend to achieve prescriptive objectives, but the theories that primarily emphasize position-taking or the role of politics generally without considering what policy or distributive goals are actually being achieved and through what structural techniques they are being achieved. As the next Part chronicles, each of these tendencies shaped the political bargains that resulted in the creation of DHS.

### **III. APPLYING THE THEORY: THE ARCHITECTURE OF THE DEPARTMENT OF HOMELAND SECURITY**

Our theory of the political-bureaucratic system provides a lens through which to interpret the legislative developments that forged the architecture of DHS. In this Part, we use the theory to better understand the statutory and institutional features that have become characteristic of DHS. In the process, we revisit our two principal questions concerning the Department's formation: why did the President change his mind to propose reorganization qua mega-centralization? Why did the President create a DHS that contains so many bureaucratic units, many of which are only tangentially related to homeland security? The answers to these questions turn out to be intimately related.

#### *A. The Political Influence of Congress*

Congressional influence permeated nearly every corner of the HSA legislation and the bureaucratic machinery it spawned. The Administration bill was short – 50 brief provisions in comparison with the congressional legislation including 200 ones – many of them in the convoluted legislative argot characteristically associated with lawmakers' desire to control the bureaucracy.<sup>120</sup> The difference between the President's proposal and the final congressional legislation reflects more than just filling in details and gaps; it

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<sup>120</sup> See *supra* notes \_\_ (discussing provisions of the HSA designed to monitor changes in functions of the Coast Guard and other agencies placed within DHS).

reflects the effects of the congressional politics engineering the new bureaucracy to serve the interests of its member; that is, to conform with the political-bureaucratic system.

Each of the principles discussed in the theoretical section applies to this case: goal distortion and the distributive tendency, multiple veto points forcing alterations in the legislation, intra-congressional committee jurisdictional issues, electoral goals of the majority party against the minority party, uncertainty about the reorganization, and the role of the crisis. As the theory predicts, these principles add up to a set of policies that are not obviously designed to succeed at the stated objective of homeland security.

Consider, for example, the impact of goal distortion as it plays out through the distributive tendency. Calculating the optimal allocation of funds is a complex task (as Powell suggests). This calculation must take into account a wide range of characteristics, including: (i) estimations of risk, themselves subject to uncertainty, such as the differential risks associated with targets in high profile cities, in places like New York and Washington; (ii) factors that reduce risk everywhere, such as increased boarder security; and (iii) the notion that making one target far more secure makes the next most vulnerable target more attractive to strategic terrorists.<sup>121</sup>

Despite the difficulty with creating an optimal spending plan, nearly everyone agrees that the allocation of funds should be based on the factors noted above, especially assessments of differential risk. Yet, as noted in the theory, spending money according to the optimal factors often implies high concentration of funds in particular districts, making these programs less popular in Congress. The congressional tendency is therefore to alter the criteria for spending in a way that spreads the money around, even at the expense of efficient pursuit of the legislation's goals. This seems exactly what has happened.

DHS Secretary Michael Chertoff statements on January 4, 2006 provide evidence for this view. In response to sharp criticism, Chertoff made the astounding public announcement that thenceforth, the Department would base part of its homeland security grant allocation on risk factors (DHS could not allocate all the funds based on objective factors because the legislation required minimum percentage spending in every state). Chertoff announced new rules about the distribution of such funds, based on the risk of terrorist attack to 35 urban areas deemed to be especially vulnerable to attack. Chertoff also stated that homeland security grants are "not party favors to be distributed as widely as possible," thereby suggesting that the previous approach to distributing grants amounted to such "party favors."<sup>122</sup> This admission acknowledged that the Department had *not* based its assessments on risk factors prior to this time.<sup>123</sup>

Indeed, a wide range of reports imply that some DHS spending may have degenerated into another source of congressional pork, especially though spending money in rural states with relatively low risks of terrorist attack.<sup>124</sup> While the port of New

<sup>121</sup> See Robert Powell, *Defending Against Terrorist Attacks with Limited Resources*, Unpublished Working Paper (2005)(on file with author).

<sup>122</sup> Dan Eggen, *D.C. May Benefit as DHS Bases Grants on Risk*, WASHINGTON POST (January 4, 2006).

<sup>123</sup> *Better Late than Never*, WASHINGTON POST A14 (January 5, 2006).

<sup>124</sup> *The Congress From Nowhere*, N.Y. TIMES (Nov. 18, 2005); *Failing on Homeland Security*, N.Y. TIMES, (Dec. 6, 2005); and *Risky Funding*, WASHINGTON POST A14 (Nov. 21, 2005).

York and New Jersey is widely regarded as the highest risk, it received only \$6.6 million in FY 2005, about equal to Memphis and far behind Houston's \$35.3 million.<sup>125</sup> The recent attempts to renew the Patriot Act in late 2005 witnessed attempts in the House to place greater emphasis on risk factors and to lower the guaranteed minimum percentage going to each state from the prevailing .75 to .25 percent. The Senate, with its greater rural bias, beat back this plan so that the original law would prevail. This topic may well be revisited as the Congress reconsiders the Act's renewal early this year.<sup>126</sup> Similarly, an analysis of per capita homeland security grant spending for FY 2003 and FY 2004 indicates that in both years Wyoming—the best-funded state—received \$35.30 and \$37.74 per capita, respectively. New York State, on the other hand, received only \$5.10 and \$5.41 per capita in each respective fiscal year. The small state-bias seems rooted in legislators' distributive interests, filtered through institutions enhancing the political power of small states, rather than in meticulous analyses of why such funding should be allocated to Wyoming or similar states.<sup>127</sup>

As the theory suggests, legislators' distribution of federal funds reflects a *common pool problem*: while all are better off from a homeland security program that fulfills its objectives, each is better off if his or her district gains a bigger share of the total. When all members seek greater funds for their districts, however, the consequences can be enormous. Members of Congress have greatly hindered DHS's ability to address the pressing problems of terrorism in America by prescribing constraints on spending that have little or nothing to do with homeland security and all to do with their reelection prospects.

Another policy realm where legislators' reelection concerns seem to be paramount to security concerns is the creation of the so-called "Homeland Security Centers of Excellence." The department created six such "HS-Centers," located at the following universities: Johns Hopkins; the University of Southern California; Texas A&M; Minnesota; Maryland; and Michigan State. Each HS-Center has received a grant of between \$10 million and \$18 million over a three- or five-year period to study topics ranging from network analysis to the economic consequences of terrorist attacks.<sup>128</sup> We hypothesized that these centers would be created in the districts of legislators poised to lose committee jurisdiction as part of the transfer. Table 2 suggests this may have been the case: instead of creating a mechanism for choosing center locations on the basis of defensible analytic criteria, the statute essentially dictated the location of new centers – placing them in areas where at least one member of the congressional delegation stood to lose a measure of committee power. Although such a loss of jurisdiction is almost never welcome among legislators, funding for the new homeland security centers may have served as part of the political exchange to increase support for the new legislation among members facing the prospect of diminished jurisdiction.

<sup>125</sup> Failing on Homeland Security, *supra* note 125.

<sup>126</sup> See Roberts, *supra* note 102, at \_\_\_\_.

<sup>127</sup> See *id.*

<sup>128</sup> U.S. Dep't of Homeland Security, *Homeland Security Centers of Excellence* (2004), avail. at [www.dhs.gov](http://www.dhs.gov). (last accessed January 3, 2006).

**Table 2: Congressional Representation in HS-Center States and Districts**<sup>129</sup>

HS-Center	District	Representatives	Committees	Losing Jurisdiction?
Johns Hopkins (Baltimore, 21202)	MD (7)	Rep. Elijah Cummings (D) Sen. Barbara A. Mikulski (D) Sen. Paul S. Sarbanes (D)	Govt Reform (9 of 19 D); Transportation (18 of 34 D) Appropriations; Health Banking; Budget; Foreign Relations	Yes Yes No
USC (LA, 90089)	CA (33)	Rep. Lucille Roybal-Allard (D) Sen. Barbara Boxer (D) Sen. Diane Feinstein (D)	Appropriations (23 of 29 D) Commerce; Environment; Foreign Relations Appropriations, Energy; Intelligence; Judiciary; Rules	No No Yes
Texas A&M (College Station, 77843)	TX (17)	Rep. Charles Stenholm (D) Sen. Phil Gramm (R) Sen. Kay Bailey Hutchinson (R)	Agriculture (RMM) Banking (RMM); Budget Appropriations; Commerce; Rules	Yes No No
Minnesota (Minneapolis, 55455)	MN (5)	Rep. Martin Olav Sabo (D) Sen. Paul Wellstone (D) Sen. Mark Dayton (D)	Appropriations (4 of 29 D) Foreign Relations; Health; Indian Affairs; Small Business; Veterans' Affairs Agriculture; Armed Services; Rules	No Yes Yes
Maryland (College Park, 20742)	MD (5)	Rep. Steny Hoyer (D)	Appropriations (5 of 29 D); House Administration (RMM)	No
Michigan State (East Lansing, 48823)	MI (8)	Rep. Mike Rogers (R) Sen. Carl Levin (D) Sen. Deborah Stabenow (D)	Financial Services (36 of 37 R); Transportation (28 of 42 R) Armed Services (Chair); Govt Affairs; Intelligence; Small Business Aging; Agriculture; Banking; Budget	Yes No Yes

A third example of political bias in the distribution of funds concerns the new structures for the transfers of funds. After 2001, Congress slightly reduced funding for natural disaster grants and dramatically increased funding for counterterrorism grants.<sup>130</sup> One example of an explosion in grant funding can be seen with grant opportunities provided through what was once the Department of Justice's tiny Office of Domestic Preparedness. The office was transferred to DHS. Its grant-making abilities have grown exponentially since the transfer. In FY 1998, the Office of Domestic Preparedness awarded \$12 million through a single grant program. As Table 3 indicates, by FY 2003, the office was in charge of meting out funds in seven separate programs, each ranging in

<sup>129</sup> All Congressional data from Michael Barone and David Cohen, *The Almanac of American Politics 2002*, Washington, D.C.: National Journal, 2001.

<sup>130</sup> See Roberts, *supra* note 102, at \_\_\_\_.

total funding from \$19 million to \$1.5 billion.<sup>131</sup> Far from reluctant participants in this growth, legislative majorities voted to fund the grants well beyond what the President requested – adding over \$800 million to the president’s request in this category for the FY 2004 budget.<sup>132</sup>

**Table 3: Domestic Preparedness Grant Programs, 1998-2003<sup>133</sup>**

Fiscal Year	Name and Description of Program	Total Funding Provided in Award Cycle
1998	State and Local Domestic Preparedness Equipment Support Program	\$12 million
1999	County and Municipal Agency Domestic Preparedness Equipment Support Program	\$37.1 million
	State Domestic Preparedness Equipment Program	\$53.8 million
2000-2001	State Domestic Preparedness Equipment Program	\$2.9 million
	Nunn-Lugar-Domenici Domestic Preparedness Equipment Program	\$15 million
	State Domestic Preparedness Equipment Program	\$145.3 million
2002	State Domestic Preparedness Program	\$315 million
	Citizen Corps and CERT Grants (FEMA)	\$21 million
2003	CERT Guidance (FEMA)	\$19 million
	UASI Port Security Grant Program	\$75 million
	UASI Transit Security Grant Program	\$65 million
	UASI Grant Program I	\$96 million
	UASI Grant Program II	\$506 million
	State Homeland Security Grant Program	\$566 million
	State Homeland Security Grant Program II	\$1.5 billion

While the funding of preparedness and research has proven to be an important aspect of the new Department’s activity, legislative process did more than simply inject distributive concerns into the architecture of DHS. It also diluted the extent to which lawmakers considered the prescriptive merits of reorganization, or reorganized the internal distribution of legislative committee jurisdiction to realize those benefits.

The overt rationale for creating the massive agency was coordination. Yet the prescriptive benefits of reorganization are highly uncertain. Centralization creates a far more massive organization, implying that organizational leaders have much greater difficulty mastering the various pieces. Department leaders’ difficulties in managing

<sup>131</sup> See *House Appropriators Add \$1 Billion to Homeland Security Request*, DEF. DAILY (June 24, 2003), avail. at 2003 WLNR 12779928.

<sup>132</sup> See *id.* (“Other allocations include \$.4 billion for the Office of Domestic Preparedness... an \$888 million increase above the administration’s request.”).

<sup>133</sup> U.S. Department of Homeland Security, Office of Domestic Preparedness Grant Program, [http://www.ojp.usdoj.gov/odp/grants\\_programs.htm](http://www.ojp.usdoj.gov/odp/grants_programs.htm). Last accessed January 14, 2006.

FEMA and its natural disaster mission have made this plain.<sup>134</sup> Centralization may also contribute to greater monopolization of functions within the government, yielding less competition among bureaus and dissipating the potential benefits of competition. Reorganization creates considerable uncertainty about future career paths for bureaucrats. Those whose futures have been downgraded or who face the most uncertainty are most likely to work less hard or leave the agency. This too has become evident in FEMA, as many of its former employees simply left.<sup>135</sup> Finally, substantial short-run costs arise from centralization as agencies undergo the transactions costs of integrating personal, information, financial, management, and field systems. These raise serious questions – almost entirely neglected in the legislative process – about whether centralization on the scale of DHS has had a net increase in the effective provision of homeland security.<sup>136</sup>

A second prescriptive problem legislators neglected involved the mismatch of congressional jurisdictions and bureaucratic centralization. Although the reorganization made massive changes in bureaucratic organization, Congress declined to engineer the parallel changes in congressional oversight. The House Judiciary committee is particularly illustrative. Among the Judiciary Committee's many amendments, the committee voted to transfer only the law enforcement functions of INS to DHS, keeping the citizenship functions at the Department of Justice (DOJ) and, obviously, under the purview of the committee. Besides retaining their oversight functions, the Judiciary Committee also voted to increase their responsibility by approving an amendment to transfer the Secret Service and the Federal Law Enforcement Training Center from Treasury to the DOJ.<sup>137</sup> The House leadership did create a special nine-member Select Committee on Homeland Security in July 2002 to screen the changes made by individual

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<sup>134</sup> See SELECT BIPARTISAN COMMITTEE TO INVESTIGATION THE PREPARATION FOR AND PREPONSE TO HURRICANE KATRINA, A FAILURE OF INITIATIVE 3 (2006) ("DHS was not prepared to respond to the catastrophic effects of Hurricane Katrina," and "DHS had varying degrees of unfamiliarity with [its] rules and responsibilities under the National Response Plan and National Incident Management System"). See also *infra* Part III.e.

<sup>135</sup> Jon Ellison, *Disaster in the Making: As FEMA Weathers a Storm of Bush Administration Policy and Budget Changes, Protection From Natural Hazards May be Trumped by "Homeland Security,"* BALTIMORE CITY PAPER, Sept. 29 2004 at 9 ("Within FEMA, the shift away from mitigation programs is so pronounced that many longtime specialists in the field have quit. In fact, disaster professionals are leaving many parts of FEMA in droves...").

<sup>136</sup> See generally Lewis, *supra* note 7, at \_\_\_. Regarding the application of this insight to intelligence issues, see generally Joseph, *supra* note 39.

<sup>137</sup> A similar pattern of efforts to protect or enhance committee jurisdiction may be observed in the markups of other committees. For example, the House Science Committee voted to strike the ability of the DHS Secretary to carry out civilian human health research through the Department of Health and Human Services, essentially voting to maintain the Science Committee's jurisdiction over such programs. Finally, the House Transportation Committee, chaired by Don Young (R-Alaska), one of the most outspoken critics of jurisdictional reorganization, voted to halt the transfer of the Coast Guard from the Department of Transportation to DHS and to retain FEMA as an independent agency. Moreover, these concerns were quite well-founded. The transfer of agencies to DHS meant that some bureaucracies were losing huge proportions of their funding and facing a decrease in their security-related missions. These changes affected not only the agencies themselves, but also their allies in Congress. As the Treasury Budget-in-Brief for FY 2004 states: "The transfer of the Federal Law Enforcement Training Center, United States Customs Service, United States Secret Service, a majority of the Bureau of Alcohol, Tobacco and Firearms, Counter-Terrorism Fund and Inter-Agency Crime and Drug Enforcement accounts represents nearly 90% of Treasury's law enforcement mission and almost a third of Treasury's total FY 2003 budget." (pg. IV)



committees,<sup>138</sup> but House Speaker Hastert largely populated this panel with committee chairs who could protect their jurisdiction.<sup>139</sup> Legislators also showed significant resistance at the time the HSA was passed. President Bush reportedly made some early attempts to encourage Congress to solve the jurisdictional issue,<sup>140</sup> but legislators essentially ignored him.

The massive bureaucratic reorganization unaccompanied by any congressional reorganization implies that the structure of bureaucratic incentives induced by congressional oversight work against the effects of centralization. This problem raises another variant of the congressional common pool problem: though all members may have wanted to achieve significant homeland security improvement, they also sought to control a piece of the bureaucracy. Doing so, legislators could claim credit for steering policy in a highly-salient domain,<sup>141</sup> and for steering funds in directions benefiting constituents. Many members of the relevant subcommittees have specialized in helping existing constituents of the agencies being moved to DHS. To the extent that coordination lowers the level of service legislators could provide to their constituents, these members are likely to use their oversight jurisdiction to impede coordination.<sup>142</sup>

Because the creation of the DHS made massive changes to the bureaucracy while leaving the existing structure of congressional jurisdictions in place, congressional incentives cut against the goals of centralization and coordination.<sup>143</sup> The piecemeal set of congressional jurisdictions reflected the old set of priorities; in particular, a set of agencies that did *not* coordinate. Much of the lack of coordination under the old system represents a set of diverse agencies serving diverse constituencies overseen by a diverse set of subcommittees. Leaving the old congressional jurisdictions intact allows representatives of the old, uncoordinated system to pull their agencies away from the coordination-related goals of the new system and to continue to serve their old constituents' interests. In addition, leaving the existing distribution of committee jurisdiction yields another problem interfering with the potential benefits of centralization: the new agency's leaders must report to all of the separate congressional committees, depleting the time they can devote to coordinating the Department. In a less sprawling reorganization, such reporting demands may prove less problematic. Not so with DHS; by 2004, department officials were called to testify – on average – about twenty times a month.<sup>144</sup>

Yet most of these prescriptive concerns – whether about the merits of centralization, or about the need to overhaul congressional committee jurisdiction in order to capture the benefits of centralization – were cast aside. Instead, senior legislators

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<sup>138</sup> See *supra* note \_\_, at \_\_ (discussing the establishment of the select committee).

<sup>139</sup> Edward Epstein, *Homeland Security in Hot Seat; Top 4 in Bush's Cabinet Try to Head Off Partisan Turf Wars*, S.F. CHRON (July 12, 2004), accessed January 1, 2006.

<sup>140</sup> Lydia Adetunji, *Bush Warns of Homeland Security Turf Battles Ahead*, FIN. TIMES, June 8, 2002, accessed December 12, 2005.

<sup>141</sup> See Fiorina, *Congress: Keystone*, *supra* note \_\_.

<sup>142</sup> For a discussion of a similar strategic problem arising in the context of closing military bases, see *Dalton v. Specter*, 114 S.Ct. 1719 (1994).

<sup>143</sup> Fiorina makes this point more generally. See Morris P. Fiorina, "Congressional Control of the Bureaucracy," in Dodd and Oppenheimer, *Congress Reconsidered* 2nd ed. (1981).

<sup>144</sup> See Susman, *supra* note \_\_, at 3.

from both parties maneuvered to preserve their committees' power. And the parties themselves competed in trying to take credit for an impending reorganization with growing public salience. In the process, Republicans appear to have baited the Democrats on several issues, notably the drug liability and civil service exemptions. In the debate just prior to the 2002 elections, several visible Democrats opposed these provisions. The strategy seemed to work: those Democrats who opposed these provisions were painted as being against homeland security, and several key members, most notably Senator Max Cleland, lost their reelection bids.<sup>145</sup> In the weeks before the November 5, 2002 midterm Congressional election, polling results reveal that the public viewed the President and the Republican Party as better at handling national security-related issues. In a poll of registered voters, a July 2002 CBS News/New York Times poll found that 49% of respondents thought that the Republican party would be "more likely to make the right decisions when it comes to dealing with terrorism," as compared to only 22% who believed the Democratic party would do so.<sup>146</sup> These results suggest that voters responded to a successful effort by the President and the Republicans to project a favorable image of their handling of homeland security immediately prior to the midterm election.

### *B. The Political Influence of the President*

Along with Congress, the President exerted considerable influence over the creation of DHS, with the massive scope the reorganization plan a case in point. But given the extent of the legislature's influence, the White House's role in the

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<sup>145</sup> Regarding the strategy, see Clarke, *supra* note 26, at 250 ("Those who opposed the legislation, the Administration's supporters implied, were unpatriotic..."). Regarding its effects, see, e.g., Josh Kraushaar, *Veteran Operatives*, CONG. DAILY (Feb. 2, 2006), avail. at 2006 WLNR 1883447 ("Now-Sen Saxby Chambliss, R-Ga., scored political points for attacking Cleland's opposition to the bill creating the Homeland Security Department because it lacked protections for the union rights of employees."); Bob Kemper, *Loyalty to Bush Helps Georgian Rise*, ATLANTA JOURNAL-CONST. B1 (Feb. 2, 2005), avail. at 2005 WLNR 8625211. Kemper notes that:

In his 2002 race against Democratic Sen. Max Cleland, Chambliss ran a television ad juxtaposing images of Osama bin Laden, Saddam Hussein and Cleland, who lost both legs and an arm in the Vietnam War. The ad attacked Cleland's vote against Bush's version of a bill to create the Department of Homeland Security. Cleland said he supported forming the department, but wanted workers to have civil service protections. The administration said the department, because of its sensitive nature, should not be encumbered by such labor rules.

<sup>146</sup> Survey by CBS News/New York Times, October 27-October 31, 2002. Retrieved January 14, 2006 from the iPOLL Databank, The Roper Center for Public Opinion Research, University of Connecticut., [www.ropercenter.uconn.edu/ipoll.html](http://www.ropercenter.uconn.edu/ipoll.html). The same organizations found that in October 2002, 52% of respondents thought that the Republican party would be "more likely to make the right decisions when it comes to dealing with terrorism," as compared to only 20% who believed the Democratic party would do so. Survey by CBS News/New York Times, October 27-October 31, 2002. Retrieved January 14, 2006 from the iPOLL Databank, The Roper Center for Public Opinion Research, University of Connecticut., [www.ropercenter.uconn.edu/ipoll.html](http://www.ropercenter.uconn.edu/ipoll.html). Other polling organizations revealed similar patterns. In an October 2002 poll, NBC News/Wall Street Journal found that 49% of respondents thought that the Republican party would do a better job dealing with the war on terrorism, while only 13% thought the Democrats would and 27% thought that both would do about the same. Survey by NBC News, Wall Street Journal and Hart and Teeter Research Companies, October 18-October 21, 2002. Retrieved January 15, 2006 from the iPOLL Databank, The Roper Center for Public Opinion Research, University of Connecticut. <<http://www.ropercenter.uconn.edu/ipoll.html>>.

reorganization raises the question of whether the President was merely responding to external pressure.

Consistent with such a conjecture, some observers place considerable explanatory weight on the existence of what might be termed a “bandwagon” effect, where the President’s hand was forced by growing legislative interest in creating the new Department. To the extent that some form of reorganization was likely to pass, the argument presumes, the President’s public image was best served by being in favor of DHS rather than by opposing it and losing.<sup>147</sup> Moreover, perhaps the president also had an incentive to differentiate his plan from others so as to be able to claim credit for the reorganization.<sup>148</sup>

Although the bandwagon effect undoubtedly came into play – and may even explain the president’s initial willingness to revisit the creation of the Department – it cannot explain the details of the White House proposal, such as why the President’s alternative plan was so massive. The President could have gotten on the bandwagon with a reorganization only modestly different from those already being Congress, and would have almost certainly heightened the possibility of its adoption by proposing a smaller reorganization devoid of features such as assistant secretary positions not subject to Senate confirmation that were designed to heighten presidential influence.<sup>149</sup> Viewed from this perspective, a reorganization of comparatively larger scope and size may have posed a heightened risk to the President’s image as an effective leader.

To explain why the reorganization included so many different bureaucracies, we raise another piece of the puzzle. Why did Bush, so fiscally profligate in general, insist that the DHS be “revenue neutral?” The stated rationale for the large DHS umbrella was that centralization and coordination would improve homeland security. Yet this rationale alone cannot explain why centralization went so far to include so many agencies (and parts of agencies) whose missions are so tangential to homeland security. As we have seen, the uncertainty about the effects of reorganization combined with the lack of congressional jurisdictional reorganization to question whether centralization would yield net benefits for homeland security. Reflecting Bush’s initial misgivings about reorganization, the administration understood these problems in advance, and these weighed against centralization.

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<sup>147</sup> For a cogent review of the somewhat contradictory evidence providing limited support for modest bandwagon effects, see Richard Nadeau, Edouard Cloutier, and J.H. Guay, *New Evidence About the Existence of a Bandwagon Effect in the Opinion Formation Process*, 14 INT’L POL. SCI. REV. 203 (1993). For analyses of the evolution of homeland security policy claiming the impact of a bandwagon effect, see Kettl, *supra* note \_\_, at \_\_, and Clarke, *supra* note 26, at 250-51.

<sup>148</sup> Ackerman and Elliott detail a similar political competition between Senator Edmund Muskie (D, ME) and President Richard Nixon in the formation of the first major environmental protection legislation. See Bruce A. Ackerman, Donald Elliott and John Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J. LAW, ECON. & ORG. 313 (1985).

<sup>149</sup> A related contention focuses on the President’s need to reinforce the public’s perceptions of his leadership abilities, a goal that could be furthered if he was perceived as guiding the nation’s new legislative effort. See Kettl, *supra* note \_\_. This factor may have also affected the President’s actions, but it too fails to explain the massive size of the reorganization. Demonstrating presidential leadership qualities depends on achieving legislative victory; in contrast, presidents with grand proposals resulting in conspicuous legislative failure hardly convey the dynamic leadership qualities that they presumably seek to project.

Our thesis is that a major reason why DHS encompassed a massive reorganization is that it furthers Bush's *domestic* policy interests that are largely independent of homeland security. Indeed a major consequence of the new DHS structure – perhaps the most important consequence – concerns domestic policy, not homeland security. Legislators understood that the creation of the new department would inevitably have consequences for domestic policy. First, legislators were clearly concerned about what the new department would mean for the important non-security duties for which the agencies in question were charged. Much of the early debate in Congress about the president's proposal focused on whether, for example, it was wise to transfer FEMA and the Coast Guard to DHS given their domestic policy mandates. As noted above, the legislation addressed this directly.<sup>150</sup>

The HSA demonstrates the extent to which political actors recognized the domestic regulatory policy stakes of the creation of the Department.<sup>151</sup> The committee report accompanying legislation concludes:

[M]any agencies within the Department... perform important non-homeland security missions that Americans rely on every day. The Animal and Plant Health Inspection Service protects ecosystems from invasive species. The Federal Emergency Management Agency assists local communities to prepare for and respond to natural disasters. The U.S. Coast Guard performs essential maritime search and rescue, fisheries enforcement, marine safety, marine environmental protection, navigation assistance, and migrant interdiction functions. The Department of Homeland Security's Bureau of Citizenship and Immigration Services provides asylum for refugees and assists immigrants in becoming American citizens. The Customs Service protects and monitors foreign trade that is essential for a healthy American economy. The Secret Service monitors and protects against identity theft, counterfeiting, and other financial crimes.<sup>152</sup>

Nonetheless, the provisions in the bill also demonstrate how, despite these concerns, the explicit terms of legislative compromise creating DHS allow for a diminution in domestic regulatory activities. Put simply, the DHS provides a statutory and organizational framework that allows Bush officials to divert a wide range of resources from agency legacy mandates to homeland security activities. Regardless of whether these activities, tangential to homeland security, have any impact on security, the administration has

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<sup>150</sup> The HSA ultimately included a provision in Title I of the act which explicitly requires DHS to respect the non-terrorism related functions of the so-called "legacy missions" of the transferred agencies. Perhaps more strikingly, the HSA provisions governing the Coast Guard reiterate the importance of respecting the non-homeland security oriented Coast Guard missions and impose monitoring requirements on its work, but still allowing the Secretary to make some reductions on non-homeland security work (Section 888).

<sup>151</sup> See *supra* notes \_\_\_ (discussing provisions imposing monitoring requirements).

<sup>152</sup> U.S. Senate, Committee on Governmental Affairs, *Non-Homeland Security Mission Performance Act of 2003: Report of the Committee on Governmental Affairs, United States Senate, To Accompany S. 910*, U.S. GPO (Jul. 29, 2003). As noted in Part I, a bi-partisan group of legislators successfully added S. 910 to the HSA. These provisions created multiple layers of reporting requirements that could assist legislators in monitoring the performance of DHS in the non-homeland security areas. Nonetheless, the new law formally changed all the component agencies' missions to emphasize the homeland security function, and the Secretary and his subordinates retained considerable *de jure* and *de facto* discretion to change agency priorities.

reason to value the diversion of resources out of the legacy mandates it finds worthy of disapproval.

The potential to reshaping legal implementation through reorganization can be further grasped by contrasting it to strategies deployed by the Reagan Administration. A major policy goal of President Ronald Reagan was to reduce what many Republicans believed as a bloated federal government. This included a wide range of governmental programs that they did not value or believed outright harmful to the economy. Reagan was ideologically against an elaborate regulatory state that he disparagingly termed “big government.” When he took office, he appointed a range of administrative heads who shared his views. Many sought to sabotage their agency’s efforts, in part by simply stopping the agency’s efforts to enforce the law.<sup>153</sup>

This strategy failed. Constituencies benefiting from the agency’s regulation took the agencies to court in an attempt to get them to enforce the existing set of laws administered by the relevant agencies. The courts agreed and, absent agency proceedings that decided on a different enforcement strategy, forced them to continue administering the law as they had. Ann Gorsuch’s leadership of the EPA illustrates this failure. Her attempts to slash the agency’s budget and failure to uphold environmental laws led to her resignation.<sup>154</sup>

Bush’s goals were not the same as Reagan’s, and he did not appear to share the full extent of Reagan’s ideological commitment to the market.<sup>155</sup> Like Reagan, however, Bush believed a wide range of domestic programs should be outside the purview of the national government. The Reagan administration’s experience nonetheless demonstrated that the strategy of direct sabotage, shirking, and neglect of the law was unlikely to work.

But, as we have seen, crises have a capacity to change the political equation. One such change – which may have initially seemed unrelated to the Administration’s regulatory and administrative agenda – involved the President’s homeland security agenda. Even after the September 11 attacks, the President was reluctant to create a new homeland security cabinet agency. Despite the uncertain long-term benefits of centralizing homeland security and the high transition costs, Congress nonetheless accepted the reorganization because of their conventional common pool problems. In the President’s case, his revealed preference of no reorganization eventually dissipated in the face of gathering congressional and public support for reorganization.

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<sup>153</sup> See, e.g., Robert F. Durant, *Hazardous Waste, Regulatory Reform, and the Reagan Revolution: The Ironies of an Activist Approach to Deactivating Bureaucracy*, 53 PUB. ADMIN. REV. 550 (1993)(analyzing how legislative responses diluted the impact of White House intervention seeking to limit the regulatory reach of environmental protection policies); Marissa Martino Golden, *Exit, Voice, Loyalty, and Neglect: Bureaucratic Responses to Presidential Control During the Reagan Administration*, 2 J. PUB. ADMIN. RES. & THEORY 29 (1992)(discussing techniques of bureaucratic resistance to presidential deregulatory efforts during the Reagan Administration used by career civil servants at the Civil Rights Division of the Department of Justice and the National Highway Traffic Safety Administration).

<sup>154</sup> See, e.g., Evan J. Ringquist, *Political Control and Policy Impact in EPA’s Office of Water Quality*, 39 AM. J. POLI. SCI. 336 (1995)(discussing EPA Administrator Anne Gorsuch’s persistent efforts to limit regulatory enforcement and the limited but material effect of those efforts on the EPA’s Office of Water Quality).

<sup>155</sup> Indeed, Bush’s commitment to social policy goals implied that he believed the government should pursue a wide range of other goals.

Once the White House recognized that avoiding reorganization altogether was not an option, the Administration's strategy became decidedly more ambitious. Perhaps the September 11 attacks would provide the Bush Administration with a unique opportunity to reduce a range of domestic policies of which he disapproved. The Coast Guard's extensive regulatory functions – including the protection of marine ecosystems, the regulation of marine safety, and setting requirements for the use of port facilities – were long unpopular with a number of business constituencies that have often been supportive of Republicans in recent years, including cargo vessel operators,<sup>156</sup> the fishing industry,<sup>157</sup> tanker and oil companies,<sup>158</sup> and cruise lines.<sup>159</sup> Republicans also questioned certain FEMA functions that could be framed as essentially social welfare policies, including its role in food and shelter assistance, non-competitive mitigation grants, and subsidized flood insurance.<sup>160</sup> As historian Douglas Brinkley has written, even just a few

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<sup>156</sup> See, e.g., *Congress Signs Off on Record Tax Bill*, NEW ORLEANS TIMES-PICAYUNE A1, Oct. 28, 1990, avail. at 1990 WLNR 683251 (“Owners of commercial vessels, except fishing boats, would for the first time be charged fees by the Coast Guard for inspections, licenses for pilots, and other seamen, and other services. *The fees will be determined by the Coast Guard.*”)(emphasis added); Frank N. Wilner, *User Charges Proposed*, TRAFFIC WORLD 13, Feb. 8, 1999, avail. at 1999 WLNR 5024660 (describing congressional Republicans’ resistance to Clinton Administration efforts to use Coast Guard regulatory and revenue authority for harbor deepening and environmental enforcement). The report describes congressional Republican concern with proposed Coast Guard activities thus:

Already, House Coast Guard and Marine Transportation Subcommittee Chairman Wayne Gilchrest, R. Md., has said the administration’s intent to tax cargo-vessel operators almost \$1 billion to fund coastal, Great Lakes and St. Lawrence Seaway harbor deepening and maintenance dredging is “dead-on-arrival.” Also under attack is a proposed vessel fee to fund Coast Guard navigation and other safety assistance activities.

<sup>157</sup> See Rebecca Boren, *Coast Guard Report is Making Waves for Miller*, SEATTLE POST-INTELLIGENCER A10, April 12, 1991, avail. at 1991 WLNR 1381678. Describing the consequences of a Washington State Republican Congressman’s efforts to delay enforcement of Coast Guard safety rules on a fisheries corporation, the article notes that:

The sinking of a fish-processing trawler in calm waters off Alaska a year ago is creating a stormy sea for Congressman John Miller’s pursuit of a U.S. Senate seat in 1992. The families of some of the nine crewmen who died last March when the Aleutian Enterprise sank recently have accused the Seattle Republican of causing those deaths by interfering in the Coast Guard’s efforts to enforce marine safety rules on factory trawlers.

<sup>158</sup> See Les Blumenthal, *Oil Tanker Restrictions in Sound Will Remain*, MORNING NEWS TRIB. (TACOMA, WASH.) B01, Oct. 7, 2005, avail. at 2005 WLNR 16387520 (“A provision that would have lifted the 28-year-old [Coast Guard] restrictions on oil tanker traffic in Puget Sound will be dropped from a new energy bill, Washington state lawmakers said Thursday. The decision by *Republican sponsors of the bill* came after a lobbying effort by three of the state’s House members”)(emphasis added).

<sup>159</sup> See *Cruise Ships Sail Into Political Arena: The Industry Donated \$262,925 to Candidates and Parties This Year, A Florida Paper Reports*, BRANDENTON HERALD 5, Nov. 6, 2000, avail. at 2000 WLNR 992179. The report noted that cruise line companies have been “targeted as potential sources of tax dollars and criticized for dumping waste. To keep their tropical-dream business afloat, the luxury liners have gotten into the political game,” and that “the chief responsibility for regulating the industries’ environmental practices rests with the U.S. Coast Guard.” It also indicated that the industry appeared to generate \$605 million in wages in Florida alone, and that the Republican Party took “the largest amount” of contributions from cruise lines. In the story Florida Republican House member Tom Feeney also stated that “The cruise industry probably learned that when they weren’t super active in the political process... someone almost took their head off. I think they’ve decided to be active.”

<sup>160</sup> See, e.g., Bill Walsh, *House Panel Strips Millions From FEMA Budget; Vitter Supports Cuts to Disaster Relief*, NEW ORLEANS TIMES-PICAYUNE, June 20, 2001, avail. at 2001 WLNR 1066723 (“Despite warnings

years after FEMA's creation, "the incoming Reagan administration saw the outfit as a feel-good liberal money drain, a cousin to HUD [Department of Housing and Urban Development] and HEW."<sup>161</sup>

The new strategy sought to bring a wide range of agencies with domestic programs within the umbrella of the DHS. Three separate components of the DHS umbrella furthered Bush's domestic policy goals: one legislative, one organizational, and one budgetary. The legislative component gave all the agencies moved to DHS new statutory responsibility that differed from their legacy mandates. Specifically, agencies brought within the umbrella had a new law requiring them to act. In contrast to the agencies in the Reagan era, the agencies moved to DHS now faced a set of statutes with conflicting goals – their legacy mandates versus the new homeland security mandate. Indeed, even before the creation of DHS formalized the importance of the Coast Guard's new security priorities, the media began reporting how the agency had been forced to reorient its resources: "While only 1 percent of [the Coast Guard's resources were dedicated to port security before September 11, more than 50 percent of all coast guardsmen are now [in mid-2002] focused on homeland security."<sup>162</sup> As one longtime Coast Guard observer noted at the time, "there wasn't a whole lot of capacity for [the Coast Guard] essentially to pick up this new mission without it impacting significantly on its traditional mission."<sup>163</sup>

Second, Bush's insistence that DHS be budget-neutral implied that all resources devoted by these agencies to homeland security diverted resources from the agencies' legacy mandates. Budget neutrality forced these agencies to devote fewer resources to their legacy mandates. The more these agencies spent on homeland security, the less they spent on their legacy mandates.

Third, placing these agencies within the DHS organizational framework served to further this diversion of resources. Were the agency left independent or in its former department, the agency (possibly in collaboration with its former department) would make the determination of the tradeoff of how much resources to transfer from its legacy mandate to homeland security concerns. It could, for example, decide that three percent of its resources is appropriate. Placing these agencies within DHS, however, empowered Bush administration officials to help make that tradeoff. In particular, placing these agencies within DHS allowed departmental leaders leverage with which to force agencies to make a greater tradeoff than they would otherwise; that is, to devote greater resources to homeland security than the agency would do on its own.

In short, the creation of DHS appears to have allowed Bush to transfer resources out of agency legacy mandates into new homeland security concerns. Because Bush did

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that it could slow emergency response to future flood and hurricane victims, house Republicans have stripped \$389 million in disaster relief money from the budget as part of an effort to keep federal spending in check."); Julie Mason and Karen Masterson, *Houston Delegates at Odds: FEMA Fight Latest Flare Up in the House*, HOUSTON CHRON. A1, Aug. 5, 2001 ("Bentsen went around [House Majority Whip Tom] DeLay and took a tough public stance against a GOP plan to slash FEMA's disaster assistance.").

<sup>161</sup> Brinkley, *supra* note 10, at 247.

<sup>162</sup> George James, *A Line in the Water*, N.Y. TIMES, SEC. 14WC (MAY 26, 2002), AVAIL. AT 2002 WLNR 2065132.

<sup>163</sup> *See id.*

not value these legacy mandates, this statutory/ bureaucratic approach made him better off even if the resources diverted from legacy mandates to homeland security activities produce *no* tangible homeland security benefits.

Legislators, too, recognized early that DHS was, to some extent, a presidential power-grab and, as such, made efforts to rein in what they saw as an overextension of executive power. These attempts can be clearly demonstrated through a comparison of the president's initial bill proposal and the resulting HSA. Examples of how legislators refused to give the president the full authority he desired are repeatedly apparent. The final bill, for instance, did not give the White House the authority to appoint assistant secretaries without Senate confirmation, as was requested in the original proposal. Nor, as previously mentioned, was the president granted the right to control when agencies were transferred (Section 802 in the proposal) or the allocation of funds from the transferred agencies to the Secretary of DHS (Section 803 (c) in the proposal). Finally, Congress voted to include the establishment of the National Homeland Security Council within the Executive Office—an agency that was not proposed in the president's plan.

In addition to the legislation's language, floor statements reveal legislators' weariness of conferring more power on the president. Senator Robert Byrd (D-WV) said of the HSA in a floor statement to the Senate: "The President is clearly attempting to remove the limits on his power. I don't question his good intention. Maybe he doesn't understand what he is doing. But this is clearly an attempt to remove limits on the Executive's power..."<sup>164</sup> This comment is representative of the deep distrust Congress felt over what they perceived as a presidential grab for increased authority.

Legislators' efforts to control presidential power indicate the extent to which the President viewed the fight over DHS not only as one over the appropriate degree of centralization that should govern homeland security policy, but over the extent of direct presidential control over the regulatory, bureaucratic, and legal functions that would be vested in the new department. Although legislative responses limited how much power the President achieved through the HSA, its creation significantly enhanced the power of the executive. The new law allowed the President to select a cadre of political appointees to oversee twenty-two agencies lodged in a new bureaucracy with the daunting mission of protecting the homeland while continuing to carry out non-homeland security missions. After a tense fight in Congress, the Department civil service employees were also subject to more flexible personnel rules, thereby allowing political appointees to control them more readily.

The umbrella structure had another, organizational effect that served the same purpose of increasing executive power. By virtue of being placed within DHS, the DHS hierarchy could make it clear to the bureaucrats specializing in the legacy mandates that they were no longer the agency's priority, and therefore were less likely to be promoted into the agency's senior management. All this meant that these bureaucrats would be treated less well, and would be more likely to leave.<sup>165</sup> At the very least, the DHS

<sup>164</sup> *Congressional Record*, September 3, 2002 (Senate), pg. S0846.

<sup>165</sup> See, e.g., R.G. Edmonson, *DHS Moving Ahead After Port Worker ID Delays*, J. COMMERCE (May 17, 2006), avail. at 2006 WLNR 8536041 ("[E]mployee turnover at all levels in Homeland Security was a factor in delaying the program"); Angela Greiling Keane, *Brain Drain Pains DHS*, TRAFFIC WORLD 13 (April 3, 2006) avail. at 2006 WLNR 5395365 ("More turnover rattled the Department of Homeland



umbrella gave Bush officials and agency leaders opposed to the agency's legacy mandate additional tools with which to sabotage the agency's ability to perform their legacy legal mandates.<sup>166</sup>

As a result, the creation of DHS appears to represent a clever domestic political innovation, allowing Bush to attain goals in ways that Reagan failed. Reagan's direct attempt to circumvent or ignore domestic regulatory laws largely ended in disaster.<sup>167</sup> By giving the Bush administration new statutory and organizational tools, the DHS umbrella provided the legal means to divert considerable resources away from domestic legacy mandates.

### C. *The Role of the Post-9/11 Crisis*

The crisis following the September 11 attacks had several predictable effects on the policymaking process concerning homeland security. First, it gave the president an issue from which he could launch a new phase of his theretofore lackluster presidency and his rapidly declining public approval rating. The weekend before the 9/11 attacks, President Bush received a job approval rating of 51%; by September 21, 2001, his job approval rating had skyrocketed to a record-breaking 90%.<sup>168</sup> But this popularity was relatively short-lived as Bush's approval rating steadily dropped over the next eight

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Security..."); Spencer S. Hsu, *Weaknesses in Nation's Emergency Preparedness Exposed Yet Again by Katrina*, WASHINGTON POST WP-BUS (Oct. 15, 2005) avail. at 2005 WLNR 16732955 ("Personnel turnover, constantly changing priorities and split responsibilities among federal agencies... sap the nation's ability..."); *Homeland Security Struggles with 'Extraordinary' Turnover*, EXTREMETECH.COM (June 10, 2005) avail. at 2005 WLNR 9519206; Chris Cillizza, *Bills Scold Executive Branch*, ROLL CALL (May 25, 2005) avail. at 2005 WLNR 8280726 ("Homeland Security has had two secretaries and three deputy secretaries in its brief existence. More than 40 percent of high-level staff positions are currently vacant.").

<sup>166</sup> Our analysis of the potential policy payoffs to the White House from expansive reorganization raises two additional questions. First, if the Administration's inclusion of regulatory agencies within DHS was partly motivated by a desire to control and curtail administrative and regulatory activity, why did some Democratic proposals also include large regulatory agencies such as the Coast Guard? Although Lieberman's proposal was nearly as large in scope as Bush's, the context and substance of their proposals differed in important ways. Lieberman was likely motivated by the prospect of grabbing power for the Senate Governmental Affairs Committee, in which he played a leading role. Moreover, as Part I notes, Bush's proposal was not only larger in the end, but its development nearly resulted in the inclusion of even more regulatory agencies that were not included in Democratic proposals – such as the Nuclear Regulatory Commission and the Federal Aviation Administration. In addition, Bush's proposal included elements expanding presidential power by weakening of civil service and provisions to appoint Assistant Secretaries without Senate confirmation. Finally, as we note below, Bush's proposal was coupled with moves to impose budgetary restrictions on agencies so as to force agencies to substitute homeland security efforts for their legacy mandates. The second question is why the Department was not even larger. As with past reorganization efforts, the White House was likely to best achieving its goals by balancing the costs and benefits of marginal increases in the scope and size of the department. (1) Legislative resistance from affected committees would be greater as more functions were placed in the department; (2) the hidden domestic policy implications of the reorganization might become starkly apparent to the public; and (3) there might be a genuine risk that even more massive reorganizations would adversely impact critical functions such as air traffic control (which was considered and ultimately rejected as a candidate for inclusion).

<sup>167</sup> See *supra* notes 154-156 (discussing the limits of President Reagan's capacity to dilute regulatory enforcement).

<sup>168</sup> Frank Newport, *The American Public Reacts*, THE GALLUP POLL NEWS SERVICE, (September 24, 2001), avail. at [www.gallup.org](http://www.gallup.org). Last accessed January 14, 2006.

months to a post-9/11 low of 70% immediately before the DHS announcement. Because of the sharp decline in presidential popularity, the White House must have felt pressure to produce additional terrorism-related policy; the USA Patriot Act, creation of the TSA, the invasion of Afghanistan and a spate of other executive actions were not enough.

Bush therefore sought to take visible command of the policymaking process and shepherded the various legislation through the process, legislation that had clearly become his and not that of the Congress. To do so, he had to provide a plan that differentiated his administration's proposal from those under discussion in Congress.

Perhaps the most important aspect of a crisis is that the attentive public demanded quick action. Especially in a national security crisis where the public feels vulnerable, quick action is needed to assure citizens that their risk has been significantly lowered. Perhaps most significantly, the public cares deeply about terrorism and homeland security issues. Even before 9/11, Gallup reported that a significant proportion of Americans were concerned about being victims of a terrorist attack. In a poll in April 2000, Gallup found that 24% of respondents were either very or somewhat worried that they or someone in their family would be a victim of an Oklahoma City-style bombing.<sup>169</sup> In January of 2001, Gallup found that 47% of respondents reported that it was somewhat or very likely that terrorists or another country using nuclear weapons within the next ten years would attack the U.S.<sup>170</sup>

The public's concern increased over time,<sup>171</sup> and coincided with broad public support for reorganization. Although only limited public opinion data are available regarding the creation of DHS, available data suggests that Americans generally supported idea of a cabinet-level Department of Homeland Security even before the President's announcement.<sup>172</sup> Additionally, a January 31, 2002 poll found that 84% of respondents approved of Bush's request to spend \$38 billion on homeland security.<sup>173</sup> After President Bush made the June 7, 2002 announcement in which he endorsed the creation of DHS, public opinion reflected a belief that DHS was a good idea. In a typical poll, Gallup found that 72% of respondents approved of the creation of DHS.<sup>174</sup> The widespread popularity of reorganization suggests the potential position-taking benefit that politicians could achieve by supporting the creation of DHS.

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<sup>169</sup> *Terrorist Attacks: Public Opinion from April 1995-January 2001*, THE GALLUP POLL NEW SERVICE, (September 11, 2001), avail. at [www.gallup.org](http://www.gallup.org). Last accessed January 14, 2006.

<sup>170</sup> *Id.*

<sup>171</sup> In the weeks following the attacks, as might be expected, the number of respondents concerned about terrorism increased, with 48% of respondents reporting that they were somewhat or very worried that they or someone in their family would be a victim of a terrorist attack. Gallup Poll, September 20-21, 2001. [www.gallup.com](http://www.gallup.com). Last accessed January 14, 2006.

<sup>172</sup> In a Time/CNN/Harris poll in late September 2001, 56% of respondents believed that the Office of Homeland Security would make the country safer. Survey by Time, Cable News Network and Harris Interactive, September 27, 2001. Retrieved January 14, 2006 from the iPOLL Databank, The Roper Center for Public Opinion Research, University of Connecticut. [www.ropcenter.uconn.edu/ipoll.html](http://www.ropcenter.uconn.edu/ipoll.html)

<sup>173</sup> Survey by The Los Angeles Times, January 31, 2002. Retrieved January 14, 2006 from the iPOLL Databank, The Roper Center for Public Opinion Research, University of Connecticut. [www.ropcenter.uconn.edu/ipoll.html](http://www.ropcenter.uconn.edu/ipoll.html)

<sup>174</sup> Frank Newport, *Americans Approve of Proposed Department of Homeland Security*, THE GALLUP POLL NEWS SERVICE (June 10, 2002) avail. at [www.gallup.org](http://www.gallup.org). Last accessed January 14, 2006

As legislators and the President pursued the creation of the massive department, the public's inability to assess the intricacies of the plan had three separate effects on crisis policymaking. *First*, citizens demand for action induced political officials to prefer quick action that is less well-considered and well-designed to slower action that is better considered and better-designed. *Second*, the need to pass something quickly also allowed political officials to hide other initiatives with very different aims within the plans to address the crisis. *Third*, the demanding public, unable to analyze the implications of transition costs or organizational details, put legislators seeking better plans (or who oppose the plans) at a political disadvantage. Opposition most ostensibly delays action, and if the public cannot appreciate the policy-specificity of the argument, those seeking to improve the process appear simply as opponents. Again, this clearly occurred in the case of Max Cleland.<sup>175</sup> All three effects appeared to have an impact on homeland security policymaking.

#### *D. Budget Politics and Legacy Mandates*

Evidence from the budgets of transferred agencies is consistent with the hypothesis that reorganization was a means of furthering domestic legal and policy goals. First, in his initial proposal to create the department, Bush repeatedly promised that DHS would be "revenue-neutral," meaning that the new department would not cost any more than the combined budgets of its component parts.<sup>176</sup> Table 4 indicates that the Bush Administration's projected budgets for the Department of Homeland Security in FY 2003 and 2004 held resources constant compared to the 2002 figures (once we include both actual and supplemental expenditures). We argue that this push for budget-neutrality implies that the Administration had ulterior motives for the creation of DHS; namely, that by giving new homeland security mandates to the agencies within DHS and by not giving the agencies any new funding to perform these mandates, the president forced resources out of legacy regulatory functions of the agencies transferred to DHS.

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<sup>175</sup> This aspect of the DHS suggests the impact of voters' knowledge and sophistication, and not just the salience of the underlying issue, on the allocation of legal responsibilities across bureaucracies. Cf. Richard R. Lau and David P. Redlawsk, *Advantages and Disadvantages of Cognitive Heuristics in Political Decision Making*, 45 AM. J. POL. SCI. 951 (2001) (the use of cognitive short-cuts, or heuristics *increase* the probability of a correct vote by political experts but *decrease* the probability of a correct vote by novices). But see Arthur Lupia and Mathew McCubbins, *The Institutional Foundations of Political Competence: How Citizens Learn What They Need to Know*, in ELEMENTS OF REASON: COGNITION, CHOICE, AND THE BOUNDS OF RATIONALITY 47 (Arthur Lupia, Mathew D. McCubbins, and Samuel Popkin, eds. 2000) (low-information rationality and political competence are possible through heuristics and institutions allowing citizens to interpret complex information). There is little doubt that voters with limited knowledge can often make reasonable choices by analyzing the behavior of organized interests (and by drawing on perceptions about the relationship of their own views to those of the relevant organized interests). But voters' relative ignorance about the intricacies of legislative proposals may be especially likely to affect political circumstances during crises, where policy changes may happen more rapidly, and in circumstances where prominent organized interests (such as the NRA or the ACLU) do not take an explicit position. Both of those conditions were present when the HSA was under consideration.

<sup>176</sup> See *Take Time on Homeland Plan*, HARTFORD COURANT A8 (June 20, 2002) ("Mr. Bush says his proposal will be revenue-neutral..."); *Looking for Fiscal Patriots*, MILWAUKEE JOURNAL-SENTINEL 10 (June 17, 2002) avail. at 2002 WLNR 3684322 ("Mr. Bush's proposed Department of Homeland Security would be revenue neutral, the president's aides insist...").

**Table 4: Bush Administration Projections of Discretionary Budget Authority for the Department of Homeland Security, FY 2002-2004 (in millions)<sup>177</sup>**

	2002 (actual & supplemental)	2003	2004
Discretionary Budget Authority	31,051	27,884	29,185

In succeeding years, Departmental spending exceeded the Bush Administration's initial projections.<sup>178</sup> But once we remove supplemental appropriations such as those funding the aftermath of disasters such as Katrina, a different picture emerges. As Figure 1 indicates, overall discretionary funding for DHS remained relatively constant between 2003 and 2006, and the President's request for 2007 continues the pattern.<sup>179</sup> The key comparison in the figure is between total DHS funding (excluding supplementals) and DHS homeland security spending. Because the latter rises faster than the former, it shows that DHS spending on legacy mandates decreased.

Although the budget for DHS and its components appears to have increased substantially, much of the increase occurred through a supplemental appropriation before the new Department had been created and reflected, in large measure, disaster related expenditures associated with the September 11 attacks, new grant programs, and the creation of the TSA.<sup>180</sup>

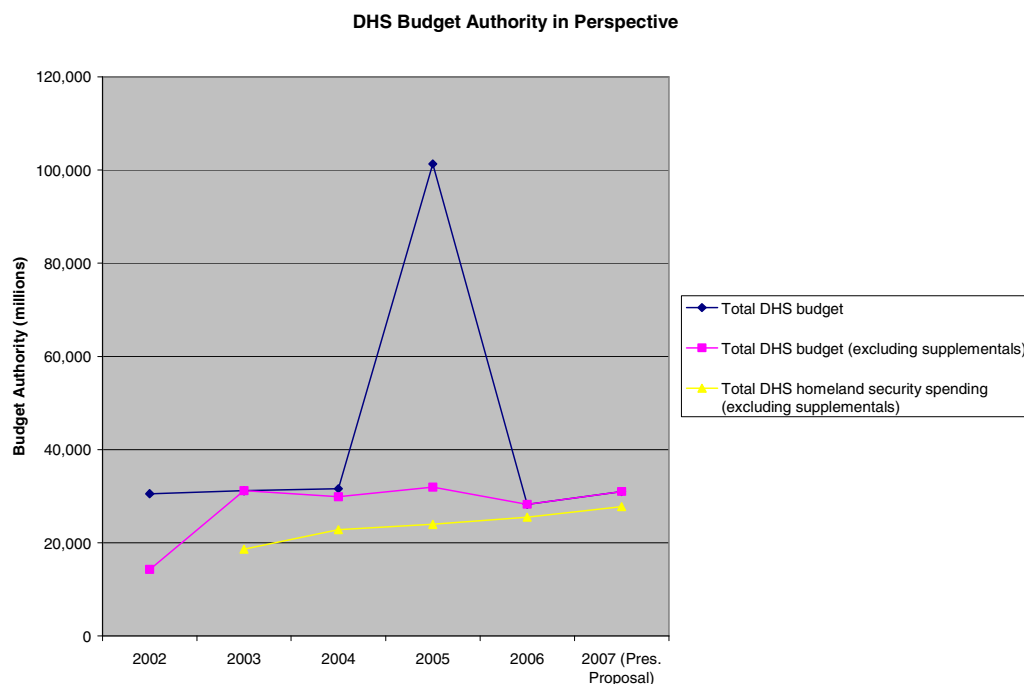
**Figure 1**

<sup>177</sup> U.S. DEP'T OF HOMELAND SECURITY, THE BUDGET FOR FISCAL YEAR 2004 161 (2003).

<sup>178</sup> See Budget of the United States 2007, Historical Tables (2006).

<sup>179</sup> See *id.*

<sup>180</sup> See Budget of the United States 2004: Department of Homeland Security (2003)(showing the size of supplemental appropriations as a proportion of total resources provided for DHS bureaus in 2002).



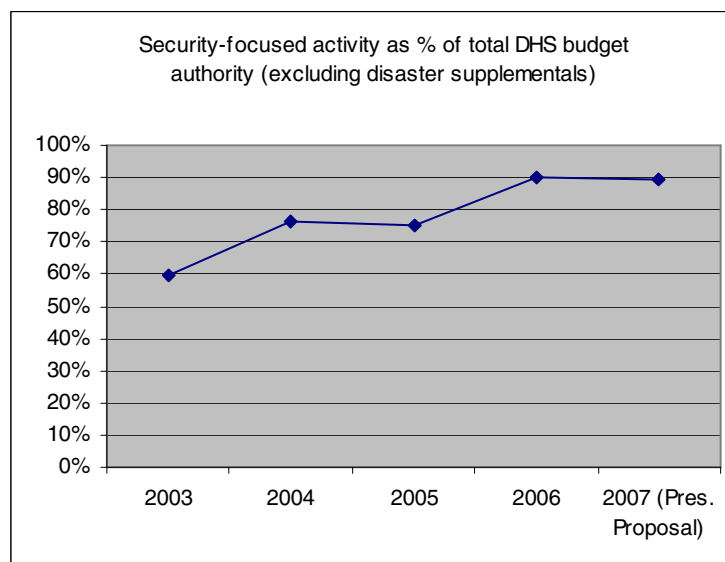
An even more telling picture emerges from the breakdown of appropriations flowing to DHS on the basis of whether the Office of Management and Budget considers an appropriation to be primarily homeland security-related or non-homeland security-related.<sup>181</sup> Total DHS discretionary funds flowing to DHS have remained essentially flat, but the dedicated homeland security resources within the department have consistently risen. As Figure 2 shows, the proportion of resources flowing to functions most directly related to homeland security has increased from about 65% to roughly 90% during the life of the Department. Admittedly, the appropriations designated as primarily homeland security-related almost certainly have the potential to provide a measure of non-security benefits.<sup>182</sup> It is revealing, however, that the White House directly identifies an increasingly dominant share of the Department's resources with security-related missions.<sup>183</sup>

**Figure 2**

<sup>181</sup> See Budget of the United States 2004, Analytical Perspectives (2003); Budget of the United States 2005, Analytical Perspectives (2004); Budget of the United States 2006, Analytical Perspectives (2005); and Budget of the United States 2007, Analytical Perspectives (2006).

<sup>182</sup> As best we can tell, OMB's definition of "homeland security" focuses on the protection of the American national territory, and its population and infrastructure, from manmade threats. See *supra* Part I for examples of other sources that have defined the term in a similar fashion.

<sup>183</sup> Even if the resources of departments and bureaus were growing overall, changes in the proportion of resources dedicated to a particular mission alter internal and external perceptions of a bureau's mission, the allocation of time and attention of its leadership, and its relationships to external constituencies. Cf. LAWRENCE S. ROTHENBERG, REGULATION, ORGANIZATIONS, AND POLITICS: MOTOR FREIGHT POLICY AT THE ICC (1994) (describing how the organization's priorities, internal culture, and relationships with external interests shifted as the proportion of economic activity it regulated increasingly involved trucking instead of rail transportation).



We can learn still more about budgetary developments by going beyond broad funding categories and examining patterns involving individual bureaus. As Table 5 indicates, some agencies that clearly encompass both traditional homeland security functions as well as domestic regulatory activities *did* experience budget increases.

**Table 5: Budget Authority of Selected DHS Sub-Agencies, FY2000-2004<sup>184</sup>**

	FY2001	FY2002	FY2003	FY2004
APHIS (millions)	634	880	1145	813
Coast Guard (billions)	3.3	3.8	4.9	4.7
FEMA (billions)	2.4	3.1	6.6	4.7

But here too, a different picture emerges from the details. Consider first the Coast Guard. Some of the budget increases for the Coast Guard cover long-anticipated infrastructure needs, and only to a partial degree.<sup>185</sup> Despite the flow of some additional resources to the bureau, some legislators maintain that the agency not received adequate resources to carry out its new mandates. In a debate during the Coast Guard reauthorization process, Representative Howard Coble commented “that the Coast Guard leaders ‘must have a magic wand’ because he said they have seamlessly assumed a range of new responsibilities without corresponding increases in funding.”<sup>186</sup> Moreover, individual appropriations account for the Coast Guard tell a story of shifting priorities. Several major programs of the Coast Guard experienced a sharp decline around 2003; most notably, these programs include Marine Environmental Protection and Search and

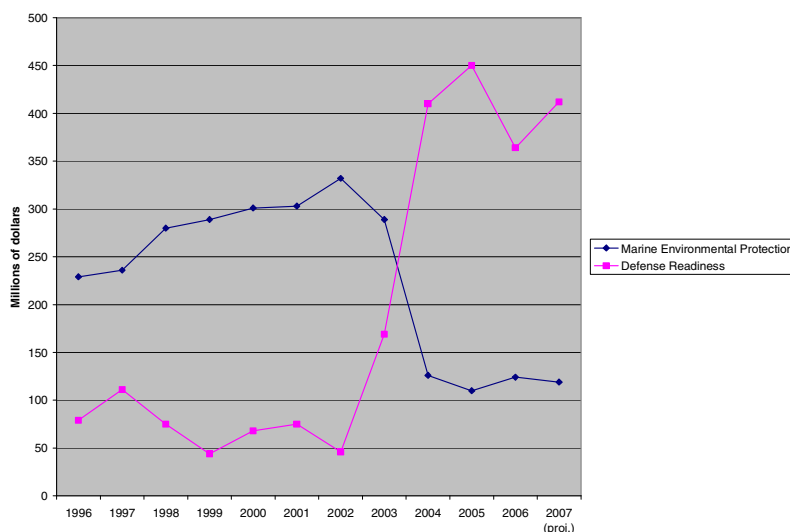
<sup>184</sup> Figures drawn from the official budget authority figures of separate agencies, drawn either from their websites or from OMB. Details on file with author.

<sup>185</sup> See MICHAEL E. O’HANLON ET AL., *PROTECTING THE AMERICAN HOMELAND: ONE YEAR ON* xix (2<sup>nd</sup> ed. 2003)(noting that new Coast Guard funds “are doing little more than addressing previous shortfalls,” and amount to “hardly a change commensurate with the new responsibilities of this agency”).

<sup>186</sup> Kathleen Hunter, *House Adopts Revision to Coast Guard Reauthorization*, C.Q. TODAY, June 26, 2006.

Rescue, both of which were on a fairly strong upward budgetary trajectory since 1996.<sup>187</sup> On the other hand, as Figure 3 indicates, programs focused on security-related issues, such as Defense Readiness and Marine Safety and Security experienced a dramatic increase in the same period.

**Figure 3**  
Selected Coast Guard Outlays, 1996-2006



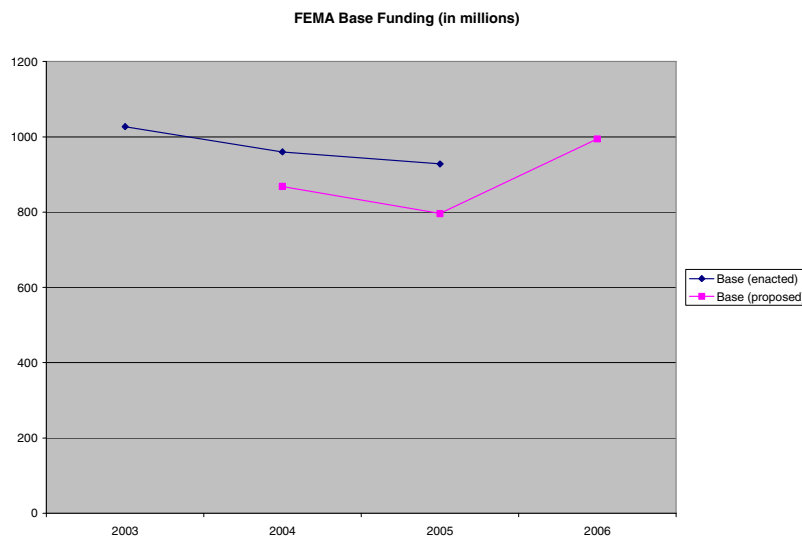
Similar budgetary developments affected the administrative functions of FEMA. FEMA's budget has two distinct components: responding to specific disasters, such as Katrina; and ("base") funding for FEMA's administrative capacity, mitigation grants, and discretionary disaster relief programs. The increase in FEMA's budget shown in Table 5 reflects both the core program budget as well as special appropriations for specific disasters such as the September 11 terrorist attacks that Congress and the President would find politically costly to ignore. In contrast, FEMA's ongoing administrative and discretionary functions, including activities such as oversight of disaster relief spending, flood insurance, and mitigation grants, may attract less public attention while inviting political controversy. As Figure 4 indicates, if we focus on FEMA's base budget, it becomes clear that FEMA's funding has remained essentially flat (or slightly declined) since the creation of DHS. By adding responsibilities and restricting FEMA's core resources, budgetary developments since the merger further strained FEMA's administrative capacities and its available resources for discretionary mitigation programs.<sup>188</sup>

**Figure 4**

<sup>187</sup> See Office of Management and Budget, *Budget Authority File, 1976-2007*, PUBLIC BUDGET DATABASE (2006), avail. at <http://www.whitehouse.gov/omb/budget/fy2007/db.html>.

<sup>188</sup> See Democratic Staff, House Appropriations Committee, *A Story of Neglect: A Review of FEMA and the Army Corps of Engineers in the Aftermath of Hurricane Katrina*, Staff Report (Sept. 8, 2005).

### FEMA Base Funding Authorization (millions)



#### *E. The Consequences of Reorganization*

Our theoretical framework provides answers to the puzzles stated at the outset. Consider the first two puzzles: Why is DHS so big, including so many agencies whose mission is tangentially related to homeland security? Part of the answer is that Bush sought to take the lead in providing homeland security. But he also used the DHS umbrella as a means for disguising a wide-ranging transformation of domestic policies. Forcing them under the homeland security umbrella had two separate, reinforcing effects. First, the reorganization forced agencies to transfer resources formerly devoted to their legacy mandates to homeland security concerns. Second, the new organizational control allowed the administration to downplay the portions of the organization that remained focused on the legacy mandates, further disrupting the agency's ability to serve this mandate. Bush valued this transformation, not necessarily because this improved homeland security, but because this transforms a variety of domestic programs. Finally, consider the third puzzle: why did Bush insist that this policy be budget neutral despite the fact that he's been so profligate in other areas? The answer is that budget neutrality is a central tool in forcing agencies to transform their operations so that they transfer resources out of their legacy mandates.

Another way to understand the dynamic of domestic regulatory impacts associated with the creation of DHS is to contrast it with an alternative administrative approach. Suppose instead of creating a massive new department, Congress had mandated that agencies undertake a "Homeland Security Impact Statement" (HSIS) in parallel with the Environmental Impact Statements created in 1969. The HSIS would require agencies to study the impact of their proposed policies – and possibly also existing ones – on homeland security. As with EIS's, HSIS's are likely to have had mixed implications. To be done seriously, they would take considerable effort. And, as with EIS's, the procedural nature of the exercise does not compel any policy changes. Moreover, this approach would not achieve Bush's domestic policy goals of forcing agencies to substitute a considerable portion of resources and personnel away from their legacy mandates.



Ironically, shifting the focus away from legacy mandates does not necessarily enhance the effectiveness of security policies. The distributive tendency has distorted DHS's spending priorities away from high risk targets to areas of significantly lower priority.<sup>189</sup> The lack of reorganization of congressional oversight jurisdictions works to preserve the non-coordination status quo, directly hindering the goal of centralization and coordination. Partisan goals led to some extreme measures relatively independent of the goal of homeland security.

Indeed, the disastrous performance of DHS and FEMA in the aftermath of the August 2005 Hurricane Katrina is a natural consequence of a political process that played down transition costs and structural problems associated with the creation of DHS. Recall that the DHS merger accelerated a process through which FEMA's natural disaster and mitigation missions were eviscerated.<sup>190</sup> As the legacy missions were downgraded, many of experienced workers left the agency.<sup>191</sup> Both a congressional committee and the White House issued reports detailing the mistakes made during the recovery efforts following the hurricane. The reports show how FEMA and DHS were unprepared for an emergency on the scale of Katrina. Both DHS and FEMA were indicted for "lack[ing] adequate trained and experienced staff."<sup>192</sup> The White House report suggests that certain

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<sup>189</sup> Although DHS has taken some steps to preserve and expand the role of technical risk analysis in the allocation of homeland security-related grant funds, such efforts have played out against a backdrop of pressures forcing DHS to allocate funds in accordance with external political dynamics. Two of the three major grant programs – the Law Enforcement Terrorism Prevention Program and the State Homeland Security Grant Program – have statutory baseline formulas that flatly require nearly half the money to be allocated *equally* on a state-by-state basis, with .75% of total funds going to each state and .25% of total funds allocated to a list of territories. See Shawn Reese, *Homeland Security Grants: Evolution of Program Guidance and Grant Allocation Methods*, CRS REPORT FOR CONGRESS RL33583 22 (August 1, 2006). In addition, the extent to which the Department has described recent changes as gradual moves to implement a more risk-based methodology suggest that the original allocation formulas more thoroughly reflected the influence of political pressures on DHS. See Robert O'Harrow, Jr. and Scott Higham, *Politics Cast Shadow on 9-11 Funds*, CINCINNATI POST K1, Dec. 26, 2005, avail. at 2005 WLNR 22002388.

<sup>190</sup> See Ellison, *supra* note \_\_\_\_\_. See also Sruti Basavaraj, *House Approves Funding for Natural Disaster Preparedness*, NATION'S CITIES WKLY., July 7, 2003, avail. at 2003 WLNR 8843200 ("Since the consolidation of numerous federal agencies under the umbrella of DHS, many stakeholders have been concerned about the dilution of the FEMA missions of response, recovery and mitigation of all hazards – including natural disasters."). For a cogent argument explaining why it is problematic to assume that capacity to respond to natural disasters and to terrorist attacks are fungible, see Patrick S. Roberts, *Reputation and Federal Emergency Preparedness Agencies, 1948-2003*, PAPER PRESENTED AT THE 2004 AMERICAN POLITICAL SCIENCE ASS'N MEETING 29 (Sept. 2, 2004)(on file with author):

There are reasons to believe that terrorism is incompatible with the definition of all hazards that existed before September 11. Terrorism lacks predictability and clear definitions: the enemy is elusive and it is unclear who or what should be involved in prevention and response. Weapons could be biological, radiological, chemical, or traditional arms, and the medical and damage control elements of response overlap with law enforcement and investigative elements.

<sup>191</sup> See Bruce Alpert, *Senators Get An Earful on FEMA, SBA: Horror Tales Feature Ineptitude, Delays*, NEW ORLEANS TIMES-PICAYUNE 2, May 20, 2006, avail. at 2006 WLNR 8696865 ("[C]onsistent turnover of personnel at FEMA forced them to start over multiple times in [citizens'] efforts for reimbursement or help"); Frank Davies, *Doubts Persist About FEMA's Ability to Respond*, NEWARK STAR-LEDGER 42, May 7, 2006, avail. at 2006 WLNR 7937023 ("FEMA lost many top professionals in the past few years, and the turnover continued after Katrina. In March [2006] a House committee reported that only 73% of FEMA staff positions were filled.").

<sup>192</sup> Executive Summary of Findings, Select Bipartisan Committee to Investigate the Preparation for and

disaster recovery responsibilities be transferred out of DHS, and considers the possibility of having DOJ oversee law enforcement and having HHS take over distributing aid to victims.<sup>193</sup> The congressional report goes beyond the conclusion that DHS and FEMA were unprepared. Its analysis highlights the problems resulting from a structure where layers of organization separated the White House from the operational command and technical advice most directly associated with the disaster response.<sup>194</sup> The report concludes that, had the structure worked better, the response to Katrina would have commenced several days earlier than it did.<sup>195</sup> An internal DHS Inspector General also said as much.<sup>196</sup>

The storm and floods would have produced a crisis of major proportions under almost any circumstances. But the available evidence suggests that the structural problems associated with DHS – particularly early in the cycle of its existence – made

Response to Hurricane Katrina, [http://katrina.house.gov/full\\_katrina\\_report.htm](http://katrina.house.gov/full_katrina_report.htm) (Last accessed March 21, 2006).

<sup>193</sup> Amanda Ripley, *Speed-Read: The White House Katrina Report*, TIME (February 23, 2006) avail. at <http://www.time.com/time/nation/article/0,8599,1167076,00.html> (last accessed March 21, 2006).

<sup>194</sup> See *Failure of Initiative*, *supra* note \_\_\_, at 131. The report notes that:

With the creation of the Department of Homeland Security and the development of the National Response Plan, an additional layer of management and response authority was placed between the President and FEMA, and additional response coordinating structures were established. The Secretary of Homeland Security became the President's principal disaster advisor... As part of these changes, critical response decisions were assigned to the Secretary of Homeland Security [who] executed these responsibilities late, ineffectively, or not at all.

<sup>195</sup> See *id.* at 132: “[A]bsent a catastrophic disaster designation from [Homeland Security Secretary] Chertoff, federal response officials in the field eventually made the difficult decisions to bypass established procedures and provide assistance without waiting for... clear direction from Washington.” Moreover, “the federal government stumble into a proactive response during the first several days after Hurricane Katrina made landfall, as opposed to the Secretary making a clear and decisive choice to respond proactively...” *Id.* These events, according to the congressional report, did not merely reflect personal failures on the part of the Secretary, but were largely grounded in structural problems: “The White House Homeland Security Council, situated at the apex of the policy coordination framework for DHS issues, itself failed to proactively de-conflict varying damage assessments.” *Id.* In the weeks immediately before Katrina arrived, Secretary Chertoff had already begun planning extensive efforts to redefine the relationship between the White House, the DHS secretariat, and FEMA. These efforts also suggest the presence of pervasive structural problems in the flow of information, decisions, responses, and coordination efforts governing disaster response. For a description of those efforts, see *Homeland Security Secretary Michael Chertoff Announces Six-Point Agenda for Department of Homeland Security*, OFFICE OF THE PRESS SECRETARY, DEP’T OF HOMELAND SECURITY (July 13, 2005), avail. at [http://www.dhs.gov/dhspublic/interapp/press\\_release/press\\_release\\_0703.xml](http://www.dhs.gov/dhspublic/interapp/press_release/press_release_0703.xml).

<sup>196</sup> See Office of Inspections and Special Reviews, *A Performance Review of FEMA’s Disaster management Activities in Response to Hurricane Katrina*, DEP’T OF HOMELAND SECURITY: OFFICE OF INSPECTOR GENERAL OIG-06-32 23 (March 2006) (“FEMA and DHS were adjusting to the national response plan”). The report emphasizes the transition costs associated with changes in the national response plan governing federal efforts after a disaster. For a discussion of how post-Katrina oversight of allegedly emergency expenditures at DHS continued to break down even after Katrina, see Mimi Hall, *GAO: TV, iPods Part of Post-Katrina Waste*, USA TODAY 3A, July 19, 2006, avail. at 2006 WLNR 12394508 (“Homeland Security Department employees, including Secret Service agents and FEMA workers, wasted hundreds of thousands of dollars on iPods, beer-making equipment, flat-screen TV, dog booties and clothing after Hurricane Katrina hit the Gulf Coast last fall, according to government investigators”). The referenced GAO report suggests that the degree of inappropriate expenditures considerably exceeded what would have been ordinarily expected in the aftermath of a natural disaster.

things worse.<sup>197</sup> Even if one makes unrealistic assumptions about the potential coordination payoffs over time, the shortcomings in FEMA's and DHS' response to Katrina are consistent with the existence of steep transition costs.

Nor was FEMA the only bureau to suffer in the reorganization. Problems also arose in other units, such as TSA. The completion of its headquarters facility was delayed by the transfer to DHS.<sup>198</sup> Its internal structure was reorganized to remove federal air marshals from its jurisdiction.<sup>199</sup> Like FEMA and other bureaus, the TSA's experience demonstrated how the reorganization could trigger a variety of costs affecting the effective performance of legal mandates, including the need to adopt new technologies and internal bureaucratic procedures associated with a new department,<sup>200</sup> internal competition for control between bureau leaders and higher-level appointees,<sup>201</sup> the burdens of adjusting to new management arrangements altering the relationship between bureaus, other agencies, and the White House.<sup>202</sup> Even if one views these management problems as temporary transition costs, they raise the question of whether the potential efficiency from the creation of DHS made up for these costs. We will return to this question in our conclusion.

#### IV. IMPLICATIONS

Though our primary focus has been on explaining the intricacies of DHS and its legal responsibilities, the following Part discusses two extensions of the argument. First, we make some cautious observations relevant to the ongoing debates about judicial deference to agency legal interpretations. Second, we describe how reorganizations appear to constitute an under-appreciated technique through which executive authorities enhance control of bureaucratic functions

##### A. *Structural Politics and Agency Legal Interpretations*

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<sup>197</sup> See Brinkley, *supra* note 10, at 268 ("In point of fact, the ultimate responsibility for the lackluster federal response to Katrina lay entirely with Chertoff, the secretary of Homeland Security. Under rules instituted in January 2005, Homeland Security was in charge of *all* major disasters, whether from international terrorism, Mother Nature, or infrastructure collapse.").

<sup>198</sup> See *Transportation Security Administration*, MID-ATLANTIC CONSTRUCTION 37, Dec. 1, 2005, avail. at 2005 WLNR 20192204 ("Complicating the short time frame and difficult logistics [associated with the preparation of TSA headquarters], the contractor also had to work with a newly formed government arm – TSA's Homeland Security department. Because the new department was still determining what its needs and requirements were, the construction team was constantly waiting for direction and reworking construction that had already been completed according to the original plan.").

<sup>199</sup> See Eleanor Stables and Toni Johnson, *CQ BillAnalysis: HR2360 – Fiscal 2006 Homeland Security Appropriations* 3, April 3, 2006, avail. at 2006 WLNR 5945020 ("The Federal Air Marshals become part of TSA. Although part of TSA when the department was created, the marshals were switched to Immigration and Customs Enforcement in November, 2003. As part of the departmental reorganization, the administration proposed moving them back to TSA"). This underscores the extent to which the Department secretariat's authority to recommend and promote internal changes within its bureaus (some of which require congressional authorization) may impose transition costs on the operation of the bureaus.

<sup>200</sup> See *Transportation Security Administration*, *supra* note \_\_\_, at \_\_\_.

<sup>201</sup> See John Mintz, *Infighting Cited at Homeland Security: Squabbles Blamed for Reducing Effectiveness*, WASH. POST A1 (Feb 2, 2005).

<sup>202</sup> See Stables and Johnson, *supra* note \_\_\_.

The familiar *Chevron* doctrine holds that courts should defer to “reasonable” agency interpretations of law where a statute does not explicitly resolve the matter before a court.<sup>203</sup> A vast literature debates the merits of *Chevron* deference and its associated doctrines.<sup>204</sup> Though engaging that literature is not our primary concern, our analysis sheds light on certain facets of the debate. In particular, our modest contribution to this ongoing debate further emphasizes the problems with making blanket assumptions about expertise or accountability, the two concepts most frequently deployed to support judicial deference. Given the political and bureaucratic problems that may pervade agencies, the case for deference is likely to be, at best, heavily context-dependent.

The expertise justifications for deference antedate *Chevron*.<sup>205</sup> Our case study, rooted in a large literature on the political control of agencies, raises questions about that rationale by emphasizing the extent to which politics can be expected to interfere with efforts to build agencies possessed of subtle technical expertise. In particular, large, umbrella organizations differ considerably from agencies with specific, narrow missions. When an agency is saddled with such a massive panoply of bureaucratic units and missions, the nature of its expertise becomes far less obvious. At the very least, it seems that the case for deferring to expertise is stronger when the interpretation itself were coming from officials directly involved in policymaking (such as Coast Guard officials) rather than higher-level political appointees (such as the Secretary or General Counsel of the Department of Homeland Security). In contrast, at least one prominent scholarly account argues for the opposite approach – affording *greater* deference to agency interpretations originating with an agency head.<sup>206</sup>

Even leaving aside the question of the precise official whose interpretations merit deference, the shortcomings associated with DHS furnish reasons for skepticism about expertise justifications for deference. Perhaps political or distributional considerations are just one aspect of the process driving the design of agencies. By demonstrating how agencies may be poorly equipped to achieve their stated goals, however, our case study of DHS emphasizes the importance of qualifying any expertise argument by acknowledging (as a starting point) the extent to which agencies may be designed to serve political rather than principled purposes.

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<sup>203</sup> See *Chevron v NRDC*, 467 U.S. 837 (1984) (*Chevron*). For some cogent examples of the prescriptive scholarship on the scope of the *Chevron* doctrine, see Cass R. Sunstein, *Chevron Step 0*, 92 VA. L. REV. 187 (2006); Thomas W. Merrill and Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001).

<sup>204</sup> See *supra* note 1 for some of the more interesting arguments made in the course of this debate. See also Jerry Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J. LAW, ECON. & ORG. 81 (1985); CHRISTOPHER EDLEY, *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF THE BUREAUCRACY* (1990).

<sup>205</sup> See, e.g., *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

<sup>206</sup> See David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201, 215 (2002). Barron and Kagan emphasize the potential accountability benefits associated with deferring to interpretations made by high-level political appointees rather than lower-level bureau chiefs. Our analysis suggests that this may be precisely backwards, both inasmuch as expertise justifications are likely to apply more weakly to cabinet officials and accountability rationales do not fully account for how structure can be used to render opaque the policy trade-offs that presidential administrations may choose to make.

Similar caveats apply to the accountability arguments for agency deference voiced by scholars and in court opinions.<sup>207</sup> Presumably, accountability justifications are grounded in the idea that the elected branches are more responsive to public pressures than the judiciary.<sup>208</sup> Ironically, the evidence suggests that the public supported the creation of DHS because it sought a more effective way of organizing the bureaucratic units with security-related functions. Our analysis questions whether such gains were realized in practice. It also shows that this rationale alone fails to explain not only the size and scope of DHS, but the underlying decision to create it. Moreover, the logic of any plausible version of the accountability argument seems to depend on a political dynamic where the Administration receives deference in interpreting the law because it is taking responsibility for regulatory policy choices.<sup>209</sup> The opposite seems to have occurred in the case of DHS – impacts on regulatory policy, ranging from environmental enforcement to trade-policy occurred without the President or his Administration taking explicit responsibility for them.

In short, accountability arguments for deference appear strained in light of how presidents can use the politics of structure to make regulatory choices more opaque to voters who are presumed (in most such arguments) to make decisions at least partly on the basis of regulatory policy. Indeed, even defining accountability in a non-tautological fashion becomes exceedingly difficult in a world where multiple branches of government with conflicting agendas are responsive to the political process and crises can increase public demands for structural changes that are prescriptively troubling.

Our claim here is a limited one. Our criticisms are not of deference, but of the most commonly-asserted arguments in favor of deference. Although prescriptive questions about the degree of deference are complex,<sup>210</sup> our analysis suggests that across-the-board approaches to deference are likely to be difficult to defend.<sup>211</sup> If agencies forged in crisis can be poorly equipped for success and have complicated indirect impacts on regulatory activity beyond their primary areas of focus, then it is not obvious that courts are naturally worse interpreters (in terms of some defensible consequentialist metric) across the board. Evaluating relative merits of courts and agencies as interpreters in such a world depends on defining concepts such as “accountability” in a non-circular manner and on empirical guesses about how courts interpret the law compared to agencies, the potential legislative responses to different regimes. Given the highly

<sup>207</sup> See *Chevron*, 467 U.S. at \_\_\_. See also *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43-44 (1983)(State Farm).

<sup>208</sup> See, e.g., Sunstein, *Beyond Marbury*, *supra* note 1, at \_\_ (suggesting that “*Chevron* reflects a salutary appreciation of the fact that the *executive* is in the best position to make the judgments of policy and principle on which resolution of statutory ambiguities often depends”)(emphasis added). One of the difficulties in evaluating this position involves fixing who or what precisely the executive is. The comparatively greater salience of electoral developments for the executive branch may often provide the beginnings of a rationale for judicial deference. Nonetheless, our concern is that general references to accountability may tend to blur intricate questions about what sort of responsiveness is desired, and why.

<sup>209</sup> Cf. *State Farm*, 463 U.S. at \_\_\_.

<sup>210</sup> Cf. Cass R. Sunstein and Adrian Vermeule, *Interpretation and Institutions* 101 MICH. L. REV. 885 (2003).

<sup>211</sup> This is, to some extent, the logic underlying the *Mead* doctrine. See *United States v. Mead Corp.*, 533 U.S. 218 (2001). But perhaps even *Mead* did not sufficiently consider the extent to which the validity of assumptions about agency accountability or expertise depends on the political context in which an agency was developed and operates.

abstract nature of many discussions regarding the merits of judicial deference to agency legal interpretations,<sup>212</sup> we suspect that it will be fruitful to refocus such discussion on the context-specific political realities that determine how agencies are actually designed, and how they are likely to function in the real world.<sup>213</sup>

### *B. Structural Politics and Presidential Control in Other Contexts*

Our theory explains how government reorganizations well beyond the context of DHS can serve as tools for politicians, particularly presidents, to enhance their political control of the bureaucracy and to reshape how the public views bureaus' core missions. Similar dynamics appear to have shaped the stories of two previous, and significant, reorganizations – the creation of the Federal Security Agency in the late 1930s (which eventually spawned today's Departments of Health and Human Services and Education), and the creation of the Department of Energy under Carter.

In 1939, President Roosevelt finally secured from Congress the reorganization authority he so aggressively sought. Almost immediately, he merged the functions of more than a half-dozen independent or subordinate social welfare and regulatory agencies closely associated with his Administration's policy priorities to create the Federal Security Agency (FSA) in 1939. The forerunner of the sprawling Department of Health, Education, and Welfare (now two separate cabinet agencies), the reorganization that created the FSA appears to have served multiple functions. First, it gave some of the Administration's most prized social welfare and regulatory agencies a politically-useful association with the concept of national security at a time when opposition to Roosevelt was growing in Congress.<sup>214</sup> In effect, the agency served to market (with Roosevelt's help) its programs as critical elements of a national security strategy that included domestic civil defense; programs to promote the economic health and well-being of Americans who could be called upon to participate directly or indirectly in a war-related effort; federal involvement in education policy to promote the dissemination of skills allegedly useful to national defense; and public health efforts designed to limit the extent to which disease affected national capacity.<sup>215</sup> Second, the creation of the FSA allowed

<sup>212</sup> See, e.g., Jacob E. Gersen and Adrian Vermeule, *Chevron as a Voting Rule*, 116 YALE L.J. \_\_\_\_ (2006)(forthcoming).

<sup>213</sup> We acknowledge some of the costs associated with broad standards instead of rules. See Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807 (2002). Nonetheless, in light of the political and bureaucratic realities associated with structural choices, the rationales that have most often animated the long-running debates supporting arguments for judicial deference to agency legal interpretations seem to us particularly unlikely to support arguments for a trans-substantive presumption of deference.

<sup>214</sup> The Roosevelt Administration's determination to emphasize national security aspects of the FSA are plain even before the beginning of American participation in World War II in documents such as Roosevelt's message to Congress describing his justifications for reorganization. See generally Mariano-Florentino Cuéllar, "*Securing*" the Bureaucracy: *The Federal Security Agency and the Political Design of Legal Mandates, 1939-1953*, STANFORD LAW SCHOOL PUBLIC LAW & LEGAL THEORY WORKING PAPER (2006)(on file with author). Roosevelt's reorganization message emphasized the centrality of strengthening the nation's defense-related capacity. See Reorganization Plan I of 1939, Title 5 Appendix Eff. July 1, 1939, 4 F.R. 2727, 53 Stat. 1423, by act June 7, 1939, ch. 193, 53 Stat. 813, as amended Sept. 13, 1982, Pub. L. 97-258, § 5(b), 96 Stat. 1068, 1085.

<sup>215</sup> See Cuéllar, *supra* note 215. Indeed, Roosevelt Administration's effort to emphasize the new agency's potential national security contributions was more than rhetoric. Even beyond the more explicit and publicly-appreciated connections to national security (particularly through the education and training

the new, centralized supervisory staff to function as an additional layer of political appointees supplementing the meager White House staff.<sup>216</sup> Third, the new agency gave the White House a vehicle that could be used to provide political cover for particularly sensitive national security projects, such as defensive and offensive biological weapons research.<sup>217</sup>

The FSA's fate suggests that presidential control sought through agency reorganization to shape public perceptions of the core goals of the affected agencies. Distinguishing FSA from the current example, Roosevelt appeared to believe that the benefits in terms of repackaging the agencies outweighed any danger that their flexibility would actually be diluted because of the new national security mission.

Several decades later, President Carter confronted a deepening energy crisis and sought to create a new cabinet-level Department of Energy. Although his decision to seek the creation of the Energy Department was fueled in part by a desire to impress the mass public with his leadership in a salient issue area, this rationale does not fully the scope of the Department, or the legal powers the Administration sought to confer on it. In fact, the Carter Administration sought to enhance presidential power through the creation of the new department in two ways. First, he sought to give the Secretary – a political appointee – power to regulate energy prices which had previously been vested in independent agencies.<sup>218</sup> This provoked opposition in Congress, resulting in a compromise that denied the President some of what he sought but nonetheless enhanced his legal control over energy policy.<sup>219</sup> Second, Carter incorporated a broad range of agencies with national security responsibilities – most notably the National Laboratories involved in nuclear weapons design and production then housed in the Energy Research and Development Administration – in addition to agencies focused on the matters more directly associated with domestic energy concerns.<sup>220</sup> By moving the National

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programs run by the Office of Education), the agency was given responsibility for leading biological weapons research and for assisting in the relocation of Japanese Americans living on the Pacific coast. *See id.*

<sup>216</sup> *See id.* *See also* L.F. Schmeckebier, *Organization of the Executive Branch of the National Government of the United States: Changes Between July 16, 1938 and April 25, 1939*, 33 AM. POL. SCI. REV. 450 (1939). Even after Roosevelt used his authority under the Reorganization Act of 1939 to dramatically expand the Executive Office of the President, the resulting White House organization still amounted to only a small fraction of the staff and organizational resources available to modern presidents. *See* MATTHEW J. DICKINSON, BITTER HARVEST (1997).

<sup>217</sup> The placement of the War Research Service within the FSA rather than the War Department therefore shows not only how social welfare and public health programs might gain prestige and supporters by being associated with national security missions, but also how secret weapons research programs could be hidden through placement in an agency that did not appear (on the surface) to be engaged in offensive weapons development. *See* Cuéllar, *supra* note 215.

<sup>218</sup> *See* Adam Clymer, *President Thwarted on Authority to Set Natural Gas Prices*, N.Y. TIMES A1, A9, July 23, 1977 (“The goal of the legislation was to centralize the setting of energy policy, with the Secretary of Energy getting the right to establish general policies...”); *Carter Proposal for New Energy Agency Seen Subject of Long Debate in Congress*, W.S. JOURNAL 3, March 2, 1977 (“The greatest controversy is expected to result from the plan to include the FPC, an independent regulatory agency, in the new department.”).

<sup>219</sup> *See* Clymer, *supra* note 219; *Senate Draft on Energy Agency Limits Proposed Powers of the New Secretary*, W.S. JOURNAL 2, April 27, 1977.

<sup>220</sup> *See Carter Sends Congress Bill For an Energy Department*, N.Y. TIMES D1, March 2, 1977 (Carter proposal would transfer the Energy Research and Development Administration – housing the National

Laboratories and strategic petroleum reserves into an executive department with a new mission and a layer of political appointees, the President gained influence over these functions and over how the public understood their purpose.<sup>221</sup>

These two additional illustrations show that executive efforts to insist on “presidential administration” of public bureaucracies long predate recent Administrations, as do legislative efforts to rein in such moves. And per our study of the DHS, these two cases also suggest that presidents use reorganizations to achieve a variety of policy goals, many well hidden from public view. Our tentative conclusion regarding the value of reorganizations to presidents seeking to enhance bureaucratic control contrasts with a perspective advanced in some quarters of the literature, suggesting that presidential efforts to control the bureaucracy began in earnest during the Clinton Administration.<sup>222</sup>

## CONCLUSIONS

This article used the evolution of homeland security policy after September 11 as a case study to analyze the allocation of legal authority within the bureaucracy, and the impact of bureaucratic structure on the implementation of legal mandates. Despite significant previous scholarship on bureaucracy and the implementation of legal mandates, such work has not yielded comprehensive theories linking the politics of bureaucratic structure to the behavior of the mass public in a crisis, inter- and intra-branch bargaining involving the legislature, and specific legal interpretations and policy outcomes straddling national security and more conventional domestic policy issues. In part because of these gaps, existing explanations for the creation of the new Department of Homeland Security have failed to provide adequate answers to crucial questions, such as why the president switched from opposition to support of the bureaucratic reorganization and why, after that initial resistance, the scope of his proposal was greater than that of past and existing proposals.

To address these questions, we began by updating existing theories of the legislative process to encompass the following four premises: (1) Other things being equal, politicians seek opportunities to control bureaucratic resources along with opportunities to signal positions that are appealing to the public, and parties differ in their substantive policy agendas. (2) The long-term marginal impact of a particular type of bureaucratic reorganization on the performance of complex legal mandates, such as promoting homeland security, is far more uncertain than politicians tend to acknowledge.

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Laboratories – and give it jurisdiction over “petroleum reserves in California and Wyoming and oil share reserves in Colorado and Utah, now under the authority of the Defense Department”).

<sup>221</sup> See Charles O. Jones and Randall Strahan, *The Effect of Energy Politics on Congressional and Executive Organization*, 10 LEG. STUD. Q. 151 (1985). Cf. Lewis, *supra* note \_\_, at \_\_ (discussing the creation of the National Nuclear Security Agency, emphasizing how the insulation of some security-related functions at the department was perceived by both legislators and the President as undoing some of the control the President would have otherwise achieved over key national security components of the agency).

<sup>222</sup> Our view of how presidents can use reorganizations to control the bureaucracy makes us skeptical of the conclusion in some recent scholarship suggesting that presidential control of the bureaucracy is a relatively recent phenomenon. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (“Presidential Administration” began in earnest in the Clinton Administration, and its major elements involve credit-claiming and direct control).



Nonetheless, changes in bureaucratic structure can have predictable statutory, organizational, and budgetary consequences by forcing bureaucracies to cut back on the performance of particular missions. (3) As the responses to drug scares, energy shortages, and the September 11 attacks demonstrate, a newly attentive public may favor structural changes even while they remain ignorant about the details. (4) Even *within* parties, legislators have divergent interests depending on their committee assignments and seniority.

None of these presumptions should be controversial. But taken together, they hold underappreciated implications for our understanding of the design and implementation of legal mandates. As individual legislators, the President, and political parties jockey for advantage, the political game tends to suppress important prescriptive concerns about the costs and benefits of centralization, the transition costs associated with reorganizations, and the fit between congressional and executive branch organization. Moreover, the combined effect of crises and public uncertainty about the impact of reorganization allow presidents to reshape administrative and regulatory policy and assert greater control over bureaucratic discretion.

Our evidence suggests the Administration exploited its legislative opening to enhance presidential control and reshape agencies' administrative discretion. It chose that course despite the risks – identified by the White House's own advisers – that doing so would adversely affect the performance of the security functions that justified the merger in the first place.<sup>223</sup> The President dismissed early consolidation efforts that seemed “kind of small to me,” and directed his staff to “think big” as they forged a plan for the department.<sup>224</sup> In response, the secret group that made decisions about what to include in the President's proposal not only crafted a consolidation plan larger than anything legislators had, but seriously considered adding three more major regulatory agencies to DHS – the Nuclear Regulatory Commission, ATF, and the FAA. Despite the fact that many legislators anticipated reorganization's adverse effect on legacy mandates, the HSA made statutory and organizational changes allowing legacy regulatory and administrative functions to be compromised.<sup>225</sup> Republicans had a long record of wanting to control and limit the administrative activities of agencies such as FEMA and the Coast Guard, a goal that was likely to be accomplished if the statutory and organizational changes made by the HSA were implemented in a revenue-constrained environment, which is what the President promised. And excluding supplemental appropriations, the Administration proved surprisingly adept at keeping revenues flat for some core functions while shifting resources away from legacy mandates.

The aftershocks from the Administration's decision to pursue reorganization have exacted a price, and plainly demonstrate the significance of these dynamics. Key advisors within the Bush Administration learned early on that creating the Department risked making the problem of coordinating security worse. The concerns were not unfounded. Although our paper is not primarily a normative assessment, we can now revisit – in light of our analysis – the question of whether the creation of DHS enhanced homeland security. Attributing marginal security-related effects to changes in

<sup>223</sup> See Brill, *supra* note 21, at 55; Clarke, *supra* note 26, at 250.

<sup>224</sup> See Brill, *supra* note 21 at 397.

<sup>225</sup> See *supra* notes 84-87 and accompanying text.

organizational structure is difficult, and indeed, the existence of uncertainty about this plays a role in our account. Might the uncertainty conceal a positive probability that the statutory choices made in creating the Department could enhance the security of Americans at a time when many might be willing to trade off other government services in exchange for such improvements? We believe the answer is negative. The department's creation is almost certainly related to a net loss in the efficiencies associated with homeland security.

To see why, recall that virtually no serious observer questioned that the transition costs of creating the department would be pronounced.<sup>226</sup> The case for transition costs (defined as obstacles diminishing the department's efficient output of security-related services for some discrete length of time) is fairly straightforward. Problems included the introduction of uncertainty regarding internal lines of authority, disruptions in established links between bureaucratic sub-units with one another and with the White House, a focus on setting up internal control structures rather than on performing the agency's substantive mission, transfer of authority to a department that initially was almost entirely devoid of resources to monitor all the security-related functions of its new bureaus, a continuing fragmentation of legislative oversight authority, and a depletion of key staff so that they could serve on detail in the central department.<sup>227</sup> From a circumstantial perspective, the performance of the TSA during its time at DHS and of FEMA with Katrina is entirely consistent with the presence of long-term transition costs.<sup>228</sup> The President's tremendous reluctance to create the Department at first in part reflected these costs.<sup>229</sup>

The question is then whether the potential security benefits are high enough to offset the transition costs. And these benefits could presumably come from two sources: (a) efficiency gains from coordination and centralization, or (b) shifts in resources away from legacy mandates toward presumably more pressing security-related missions.<sup>230</sup> With respect to efficiency gains from coordination and centralization, we found the Administration's theoretical case unconvincing.<sup>231</sup> It provided no reasonable explanation

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<sup>226</sup> See Part III.e.

<sup>227</sup> For a detailed discussion of transition costs, see *supra* Part III.e. For sources acknowledging their existence, see, e.g., Mintz, *supra* note 202 (noting that one of the major architects of the new Department, former presidential aide Richard Falkenrath, had concluded that "many officials at the department were so inexperienced in grasping the levers of power in Washington, and so bashful about trying, that they failed to make progress on some fronts"). See also Haynes, *supra* note 45 (discussing the extent of transition costs); Kettl, *Overview*, *supra* note 8, at 1 ("Although the DOD reorganization involved more employees, by almost any other measure the DHS restructuring was harder. Even the large numbers vastly understate the scale and complexity of the job."); O'Hanlon et al., *supra* note 185, at xxv-xxvi (noting that the Department "will merge 22 different agencies that contain more than 100 bureaus, branches, sub, agencies and sections.. including at least 80 different personnel systems"; and "by far the biggest challenge Ridge and his people face is to undertake this unprecedented [organizational] task while clearly keeping their eyes on the main ball – which is not to organize for homeland security but to prevent, protect, and respond to a future terrorist attack on U.S. soil.")

<sup>228</sup> See *supra* Part III.e.

<sup>229</sup> Recall that because of common-pool and related collective action problems, we should expect the President to care more about efficiencies than other politicians, unless of course there is an offsetting political rationale for doing something -- which we believe there was. See *supra* Part I.c.

<sup>230</sup> For an example of an analysis – besides that of the White House – presuming such benefits, see O'Hanlon et al., *supra* note 185, at 101-103.

<sup>231</sup> See *supra* Part II.ii.2.

for why a single cabinet agency represented an improvement over the Homeland Security Council structure. No consideration is given in its public communications to the offsetting advantages of decentralization, which have been central to spurring aggressive anti-drug enforcement, and may play an important role in intelligence and policy innovation.<sup>232</sup> No discussion exists of the extent to which some agencies across cabinet departments have better coordination (such as ATF and FBI across Treasury and the Justice Department) than other agencies within departments such as the Navy and Army within Defense,<sup>233</sup> or DEA and FBI within Justice.<sup>234</sup> And no attention is given to the reality that fragmentation actually persists (even assuming it were helpful) because of the relative decentralization of congressional control.<sup>235</sup>

Moreover, a theoretically coherent prescriptive case for the Department's creation would have been difficult for Congress to accept. If one examines the theoretical literature on organizations and bureaucracy,<sup>236</sup> the best case we could envision out for the value of centralization is one that involves either the value of distinctive expertise at the top of the agency or of concentrating accountability in one official to permit trade-offs across (rather than within) bureaus. But neither of these fit with the Department's reality. It is difficult to accept that Ridge or Chertoff were simultaneously experts in customs interdiction, disaster response, and technical cyber-security; the resource-transfer goals could have been accomplished with congressional and presidential support of a White House-based Office of Homeland Security entailing fewer transition costs (which is, not coincidentally, what the President first chose to support).

Which brings us to the difficult question of whether the security-related gains from the transfer of resources is enough to offset the transition costs. Such a prospect is unlikely. For one, homeland security threats may be plausibly viewed as the encompassing natural disaster response functions, a position that the leadership of DHS has belatedly taken after Katrina and accords with President William McKinley's 19<sup>th</sup> observation that "I am more afraid of the West Indian Hurricane than I am of the entire Spanish Navy."<sup>237</sup> Yet natural disaster response appears to have suffered not only from the transition costs associated with the merger but from the Administration's focus on statutory and administrative changes redirecting attention towards terrorism-related homeland security threats.<sup>238</sup> For another, it does not appear that the most security problems experts often cite as most pressing – involving efforts to secure weapons of mass destruction, strengthening public health and critical infrastructure, and enhancing response and recovery – have been meaningfully addressed by shifting resources within

<sup>232</sup> See, e.g., Posner, *supra* note 113.

<sup>233</sup> See Zegart, *Flawed By Design*, *supra* note 6, at \_\_\_ (describing long-running tensions between the Army and the Navy).

<sup>234</sup> For a description of the differing cultures and tensions among the DEA and FBI, see JAMES Q. WILSON, *THE INVESTIGATORS: MANAGING FBI AND NARCOTICS AGENTS* (1978).

<sup>235</sup> See Wilson, *Bureaucracy*, *supra* note 7, at \_\_\_.

<sup>236</sup> Cf. George P. Huber, C. Chet Miller, and William H. Glick, *Developing More Encompassing Theories About Organizations*, 1 *ORG. SCI.* 11 (1990).

<sup>237</sup> Regarding the Department's belated change in focus, see Spencer S. Hsu, *Can Congress Rescue FEMA? Calls for Independence Clash With Bids to Fix Agency*, WASH. POST A19, June 26, 2006. President McKinley's take on homeland security is mentioned in KERRY EMANUEL, *DIVINE WIND: THE HISTORY AND SCIENCE OF HURRICANES* (2005), *quoted in* Brinkley, *supra* note 10, at 333.

<sup>238</sup> See *supra* Part III.e.

bureaus.<sup>239</sup> Finally, even if internal shifts in bureau resources (as opposed to additional resources) were essential to addressing the preceding problems, those benefits could have been partially or almost entirely captured without the creation of the DHS.<sup>240</sup> Without the creation of DHS and its administrative oversight apparatus, however, the President would have been forced to be much more explicit about the bureau-level changes wrought by the HSA legislation.

To explain these developments, our account shows how three crucial variables affecting homeland security policy – whether to create a new department at all, its overall size and scope, and its congressional oversight structure – have been driven in specific directions by political rather than prescriptive considerations. Rare circumstances may help bring about occasional exceptions. In some policy domains, such those involving benefit payments to retirees, results may be so easy to observe that electoral constraints may force politicians to care about whether an agency is well-organized to meet its stated goals. In others, an agency may find itself with a unique degree of autonomy – allowing it to leverage the mass public’s reactions during a crisis – and there may happen to be some alignment between the agenda of the agency’s leaders and what’s prescriptively attractive. They also raise some questions about some of the canonical justifications – grounded in expertise and accountability through presidential control – for judicial deference to agency legal interpretations. Although these questions do not augur for rejection of those justifications altogether, they ought to prompt scholars and policymakers to reexamine the prescriptive merits of vesting discretion in agencies that are not effectively designed to carry out their alleged functions.

The incapacity of federal officials to effectively address broadly-held concerns about security in the midst of a crisis is ironic. Principle and intuition suggest that prescriptive concerns should be strongest in the midst of a crisis. Our analysis shows that it is otherwise in practice. In order for prescriptive concerns to prove significant, politicians must encounter precisely the sort of counterweight that so rarely emerges in the political game over bureaucratic structure: bureaucratic actors that have forged a rare degree of autonomy and seek to use it in prescriptively-attractive ways, or an electorate displaying an uncommon degree of sophistication leading it to resist naïve arguments about the benefits of reorganization. Such circumstances are, at best, strikingly unusual. They are even less common in the midst of a crisis. But without them, a crisis bureaucracy is bound to be a bureaucracy in crisis.

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<sup>239</sup> For a discussion of areas in homeland security policy that are broadly discussed as priorities by experts and policymakers yet have failed to obtain increases in funding – such as securing materials that could be used to create weapons of mass destruction abroad – see Jacob N. Shapiro and Rudolph Darken, *Homeland Security: A New Strategic Paradigm?*, in *STRATEGY IN THE CONTEMPORARY WORLD* (forthcoming).

<sup>240</sup> Because the one near-certainty in terms of prescriptive consequences involves transition costs, it seems reasonable that the burden for justifying the reorganization should be on those who claim the security benefits would exceed the transition costs. And if that burden can be carried, then the weak rationales the White House advanced are especially puzzling. We can think of no political reason why the White House would not want to offer its best rationales for the security benefits at the time when its strategy had shifted to trying to sell the Department and taking credit for its creation. *See supra* Part I.